

No. 11382

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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WILLIAM SHUBIN, FREDERICK ALEXANDER  
SHUBIN and JACK L. KISSEL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

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## TRANSCRIPT OF RECORD

(In Two Volumes)

VOLUME II

(Pages 293 to 591, Inclusive)

Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

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FILED

DEC - 4 1946

PAUL P. O'BRIEN,  
CLERK



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request was taken up with the Commissioner of Internal Revenue and that, as a result of that request, a letter was received from the Commissioner of Internal Revenue addressed to the Assistant [239] Attorney General, in which he granted the request, and they enclosed a copy of the letter which the Commissioner of Internal Revenue sent in reply to this letter of the Assistant Attorney General. And I offer these now as Government's exhibit next in number.

The Court: Has counsel examined them?

Mr. McLaughlin: Yes, I have, your Honor. And I do not make any objection to the introduction of any of these documents and accept Mr. Strong's statement that the original of the letter dated September 27, 1945, copy of which he has here, was sent by him to the Attorney General on or about the 27th day of September.

There being no objection to these documents, I assume they will go in with an exhibit number. As soon as they are offered into evidence, I want to make a further observation with respect to the statements of the three defendants that I represent.

The Court: Mark them, Mr. Cross.

The Clerk: Government's Exhibit No. 55 in evidence.

The Court: No. Offered in evidence until the defense makes its objection.

Mr. McLaughlin: I make no objection to those. They may go in, your Honor.

The Court: All right; they are in evidence.

The Clerk: 55 in evidence. [240]

(The documents referred to were marked as Government's Exhibit No. 55, and were received into evidence.)

## [GOVERNMENT'S EXHIBIT NO. 55]

WS/BVB

September 27, 1945

The Attorney General  
Department of Justice  
Washington 25, D. C.

In re: Southern California Meat Company,  
Southern California Meat Company No. 2  
Central Packing Company  
Vernon Hotel & Restaurant Supply Co.  
Hyman Stillman  
Lou Segal or Siegal, and others

---

Your Reference: .....

Sir:

In the above-entitled matters the defendants are to be charged with conspiracy to violate, and with various violations of the Emergency Price Control Act.

We are now in the process of conducting a Grand Jury investigation into the activities of these companies and individuals. Agents of the Bureau of Internal Revenue, in connection with income tax returns of the named individuals and concerns, appear to have been furnished certain information which will be very pertinent to the trial of the case arising from the instant investigation.

Will you please secure the authority of the Commissioner of Internal Revenue for Special Agents D. O. Bircher and Samuel Phoebus, and Internal Revenue Agent J. Bryant Eustice to testify on the trial of the above-

(Government's Exhibit No. 55)

entitled case, and to furnish such information and documents as are in their possession, pertinent to said case?

Respectfully,

CHARLES H. CARR,  
United States Attorney.

Address Reply to

"The Attorney General"

and Refer to

DEPARTMENT OF JUSTICE

Initials and Number

Washington, D. C.

TLC:CBM:vng

October 5, 1945

146-18-50-538

air mail

Charles H. Carr, Esq.,

United States Attorney,

Los Angeles, 12, California.

Dear Mr. Carr:

Re: Southern California Meat Company,  
Southern California Meat Company No. 2,  
Central Packing Company,  
Vernon Hotel & Restaurant Supply Co.,  
Hyman Stillman,  
Lou Segal or Siegal, and others  
(Emergency Price Control Act).

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In compliance with your request of September 27, 1945, for the Department to secure authority from the Commissioner of Internal Revenue for Special Agents D. O. Bircher and Samuel Phoebus and Internal Revenue Agent J. Bryant Eustice to testify at the trial of the above cases and to furnish such information and documents as are in their possession pertinent to the cases, it was believed

(Government's Exhibit No. 55)

from your letter that you desired that authority at our earliest convenience. Therefore, we took the matter up direct with the office of the Commissioner of Internal Revenue.

We are in receipt of a letter dated October 5, 1945, from the Commissioner granting the request. Enclosed herewith you will find a copy of the letter.

Respectfully,

For the Attorney General,

Theron L. Caudle

THERON L. CAUDLE,

Enc. #93643.

Assistant Attorney General.

[Stamped]: Received Oct 8 1945 U. S. Attorney Los Angeles, California

GC:P:TCU

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Oct 5 1945

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Hon. Theron L. Caudle,

Assistant Attorney General,

Department of Justice,

Washington 25, D. C.

In re: Southern California Meat Company,  
Southern California Meat Company No. 2,  
Central Packing Company,

(Government's Exhibit No. 55)

Vernon Hotel & Restaurant Supply Co.,  
Hyman Stillman,  
Lou Segal or Siegal, and others  
(Emergency Price Control Act.)

---

Dear Mr. Caudle:

Reference is made to your letter dated October 4, 1945, enclosing a copy of a letter dated September 27, 1945, from the United States Attorney for the Southern District of California. In his letter the United States Attorney states that a grand jury investigation is being conducted with a view to ascertaining whether any of the above-named taxpayers have violated the Emergency Price Control Act. The United States Attorney also states that certain investigating agents of the Bureau while making an income tax investigation have obtained certain information that will be pertinent in any trial of the taxpayers arising from their indictment for violations of the Emergency Price Control Act. The United States Attorney requests that you secure authority for Special Agents D. O. Bircher and Samuel Phoebus and Internal Revenue Agent J. Bryant Eustice to testify at the trial of the cases and to furnish such information and documents as are in their possession pertinent to said cases. In your letter you request that the Bureau cooperate with the United States Attorney.

(Government's Exhibit No. 55)

402579 to 402584, inc.

In accordance with your request authority will be given the special agents and the revenue agent to furnish the United States Attorney such information and documents as may be in their possession regarding the violations of the Emergency Price Control Act by the above-named taxpayers and, upon proper subpoena, to testify at grand jury proceedings and at the trial of the taxpayers in the event that they are indicted for violations of that Act.

Very truly yours,

(Signed) W. T. Sherwood

hlc

Acting Commissioner.

Case 18367 Cr. .... vs. Shubin. Gov. Exhibit. Date 6/19/46. No. 55 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

Mr. McLaughlin: I want to make this observation: There is none of this correspondence which has passed between Mr. Strong and the Assistant or the Attorney General which relates to any returns of any of the three defendants in this case at all. I want to read off from the top of those the mention of the firms and concerns which are dealt with. The letter of Mr. Strong, which is dated on the 27th of September, 1945, says:

"In re: Southern California Meat Company, Southern California Meat Company No. 2, Central Packing Com-

pany, Vernon Hotel & Restaurant Supply Company, Hyman Stillman, Lou Segal or Siegal, and others.”

Your Honor, there isn't anything in there that refers to any of the Shubins; and I submit that a communication cannot come within the terms of the regulation when it says: I want the firms of X corporation, the Standard Oil Company, and its stockholders and others. And I submit that it is no compliance with the regulation. And all of the letters which follow have the same reference. In other words, there is no direct reference to the Shubins, and that is what we are [241] concerned with in this case.

The Court: But the evidence here shows that the Vernon Hotel and Restaurant Supply Company is the defendants.

Mr. McLaughlin: Your Honor, as far as the returns of that partnership are concerned, that may be true. But these are individual statements that we are dealing with here now, and I submit that there is a distinction between a firm and the parties who may be interested in it.

They knew at the time they wrote that letter that the Shubins were in existence and they could have named them. They named Mr. Stillman or Mr. Segal. They could have named other persons but they did not name them. It may be that a return filed by the partnership is covered by that. I am indifferent about that, your Honor. But I think, as far as these individuals are concerned, there is no showing within the regulation that any of their returns or documents were properly requested or obtained.

The Court: The record here shows, and it has been stipulated, that the Vernon Hotel & Restaurant Supply Company was a partnership consisting of the three de-



fendants in this case. The request, then, in this letter of September 27, 1945, would not refer, it seems to me, to anyone except those who composed that partnership.

Mr. McLaughlin: There are partnership returns, your Honor. The partnership has filed a return. [242]

The Court: Certainly.

Mr. McLaughlin: And they are here and it may be that they are covered. But I submit that it does not cover individuals.

Let us assume that instead of three partners there were 12, or let us assume they had a limited partnership with 50. I submit that a communication like that does not come within the requirements of that regulation or statute, and hasn't any force or effect. There should be some pretense of a literal compliance with it.

Mr. Strong: I submit, your Honor, that the letters do not only request for returns, as counsel seems to have thought from the face of the letters, but requests authority for these agents to give all information and documents necessary.

If your Honor will notice, besides the name of the company itself, the partnership, which intended to include anybody embraced, it gives the names of two particular individuals concerning whom we had some information at that time, and that time was the start of the investigation; and after the names of the individuals, we specifically said "and others", and that authority is in the same terms. So that, besides being covered by the fact that the partnership name is in there and we were requesting authority for these agents to give us information and documents relative to everybody comprising that partnership, we definitely cover [243] anyone else required to be



testified about in that investigation by including the words "and others"; so that there were two places where it was actually covered. [244]

The Court: Oh, I wouldn't go that far. I wouldn't say that you could put in a general clause and then include anybody in the United States by the addition of the words "and others." In other words, the government could contend that because they said "and others" that would include anybody they desired to bring in. I couldn't follow you that far.

Mr. Strong: Well, at any rate, your Honor, the name of the partnership itself was to include all the partners, I think. It clearly does.

The Court: Well, it does disclose the partnership in the name. It says "Vernon Hotel and Restaurant Supply Company." Now, that is all you asked for.

Mr. Strong: At the outset of the investigation before the grand jury we don't have all the details which develop subsequently.

The Court: That is true. I agree with you there, but that wouldn't justify a non-compliance with the statute, would it?

Mr. Strong: No, but I submit by giving the name of the concern and asking for information concerning it——

The Court: Well, that is concerning the partnership.

Mr. Strong: And the information we got was that the partners were so-and-so and other details which we asked for was any testimony and documents which were in their possession.

I think the authority to the agents is broad enough to [245] cover all these aspects.

I might submit further that the sole question as I see it with reference to this entire situation of authority is one which goes to the statute itself and to the agents' actions in these cases. Now, I think that it might be possible under some circumstances for agents to testify despite the fact that they have no authority. It may later appear that they weren't authorized to do so, but their testimony can be taken and here we submit that their testimony is being taken pursuant to specific authority of the Commissioner of Internal Revenue to these individuals to disclose whatever information they have in their possession respecting the Vernon Hotel and Restaurant Supply Company, and of course that was a partnership as was disclosed during the investigation.

Mr. McLaughlin: May I add, your Honor, the partnership is not on trial in this case. This is an indictment against three individuals and Mr. Strong has had since way last fall in which to comply with the law. We have been liberal insofar as we could by cooperating with him in this case, but I submit that that regulation, if it is going to mean anything, it is going to mean that they have to ask for the returns of the persons that they are driving at and not some general name and then say, "and others."

Otherwise everybody is open to jeopardy. [236]

The Court: During the recess I read the *Gibson v. United States* in 31 Fed (2d) commencing at page 19 and particularly on page 22 the opinion by Judge Dietrich of the Ninth Circuit, and that refers to a definite affidavit and a definite individual who had given the affidavit which was made by the defendant Curtis in August of 1927.

Mr. Strong: May I go on?

The Court: Go on if you have any other comment.

Mr. Strong: Yes. Now, in connection with the investigation from time to time it was necessary for me to write for certain additional documents.

The Court: Yes.

Mr. Strong: And in that connection these defendants were specifically named in the letters and the answers which we have received also have in them the names of these defendants, but I am in a very peculiar position here because in the caption of these other letters there have been added the names of other persons who are being investigated and as to whom I don't think the disclosure is proper since the investigation has not been completed, and I have been going through here while your Honor was looking at that, trying to see if I had some such letter which does not also simultaneously name the other parties we have been investigating, and so far I have come across one letter which has the defendants' names in it but in the caption it has this other party's name that [247] we are investigating.

The Court: But now, assuming that is correct, would it not be necessary in order to comply with the statute to get the same authority in order to secure the information that you requested from the Commissioner?

In other words, counsel, the statute was passed by Congress for a definite purpose and a very proper purpose and that was to keep as secret in the files of the government of the United States all of the returns on of taxpayers.

The same applies to examinations of national banks and heavy penalties are imposed upon divulging any information secured by those departments.

Now, Congress saw fit to make some exceptions, and in order to take advantage of those exceptions the statute in my opinion must be strictly complied with.

Mr. Strong: The provisions of the statute refer to regulations of the Commissioner of Internal Revenue in that respect.

The Court: Yes.

Mr. Strong: They provide specifically that in effect where the testimony under disclosure is authorized by the Commissioner of Internal Revenue that it can be made.

The Court: That is right. There is no dispute about the statute.

Mr. Strong: Well, it seems to me that what this reduces [248] down to is that there is apparently no dispute about the statute or regulations, but simply whether the name of Vernon Hotel and Restaurant Supply Company covers the individual defendants, and I think that the three letters taken together, your Honor, will show that what was being investigated was everybody who was concerned with that partnership, and that the information and disclosures sought were with reference to everybody concerned with that partnership, and that the authority was being granted to my mind in general terms to include everybody who was concerned with that partnership as a person constituting that partnership.

The Court: Well, now, do you find that anywhere in the regulation of the statute?

Mr. Strong: I haven't looked at it yet in connection with that. Has your Honor done so?

The Court: I couldn't possibly go that far, counsel. I was in doubt about the Government's Exhibit 54. The first sentence reads:

"The Department of Justice has requested that you be authorized to cooperate with the United States Attorney, Charles H. Carr, Southern District of California, relative to criminal prosecutions against the above-named corporations and individuals for alleged violations of the Emergency Price Control Act." [249]

Now, there is the acting commissioner Sherwood's direction to the agent, Mr. Samuel Phoebus in the San Francisco office of special agent in charge on October 10, 1945. That sentence is very clear. He limits the authority of Mr. Phoebus to "the above-named corporations and individuals for alleged violations of the Emergency Price Control Act."

He does not say to anybody else that the United States Attorney might see fit to examine. Now, there is the further comment:

"The Department of Justice has requested—"

That, of course, should be read in the language of the statute, the Attorney-General or the assistant to the Attorney-General, but that is cleared up, that part of the exhibit is cleared up in Government's Exhibit 55, the letter from the Department of Justice to Charles H. Carr, signed by Theron L. Caudle, Assistant Attorney-General, dated October 5, 1945, reading as follows:

"In compliance with your request of September 27, 1945, for the Department to secure authority from the Commissioner of Internal Revenue for Special Agents D. O. Bircher and Samuel Phoebus and Internal Revenue Agent J. Bryant Eustice to testify at the trial of the above cases and to furnish such information and documents as are in their possession pertinent to the cases, it was [250] believed from your letter that you desired that authority

at our earliest convenience. Therefore, we took the matter up direct with the office of the Commissioner of Internal Revenue.

"We are in receipt of a letter dated October 5, 1945, from the Commissioner granting the request. Enclosed herewith you will find a copy of the letter."

That is sufficient to clarify the indefiniteness as I have stated in the Treasury Department's letter of October 10, 1945, marked as Exhibit 54 and particularly in view of the rather liberal construction in *Gibson v. United States*, 31 Fed. (2d) at page 22.

I am going to sustain the objection of the defense. I don't believe there is sufficient authority.

Mr. Neukom: May I make one observation before you do so, your Honor?

The Court: Yes.

Mr. Neukom: We have got to consider that this indictment charges that these defendants operated under the name of the Vernon Hotel and Restaurant Supply Company. They operated entirely as a partnership. Your Honor, I don't believe, can make this ruling without having read the statements that were taken at this time in question because it will be very apparent in reading for instance from Govern- [251] ment's Exhibit 51, if you will read page 2, it is very obvious that the Vernon Hotel and Restaurant Supply Company's aspects, their operations which can only function through the partners, were very material to that investigation. Hence, as they are

charged in this conspiracy charged here, operating under their fictitious name as co-partners and of doing these acts which are contrary to the OPA, I feel that even though it would have been preferable to have asked for the individual returns or to ask for the information as to the parties as individuals, that still when they replied in the capacities here as members of the firm of the co-partners and as is only apparent from reading that if your Honor will say that a strict literal application would be erroneous in a case of this character.

The Court: But counsel, there is no question at all that these individuals are the Vernon Hotel and Restaurant Supply Company. There is no question in the record at all about that.

Mr. Neukom: No.

The Court: Not only that but it has been stipulated by the defense counsel that they were partners in the operation, operating under the name of the Vernon Hotel and Restaurant Supply Company.

Mr. Neukom: Yes.

The Court: Now, there is no request made under the [252] statute for the information with reference to these individuals. Now, can the court so contrue that statute and say, "Well, it doesn't make any difference. We have got a name here anyway and anybody that is connected with that company, we can secure their returns?"

I assume that the Attorney-General and the Commissioner of Internal Revenue act with discretion under the



statute. Now, the request was for the Vernon Hotel and Restaurant Supply Company, information about that company.

Mr. Neukom: Which is a co-partnership. Pardon my interruption.

The Court: Suppose there were 50 partners and the Attorney-General I assume would go down through there and say, "Here are five that we didn't make a request for for some reason. We will not permit that information to be divulged. We have other matters pending, or there are other matters in the Department so that we cannot furnish that."

I assume that they all act with discretion. I don't believe that they just act without any consideration, otherwise the statute would be meaningless.

Now, the Attorney-General and the Commissioner of Internal Revenue have no information as far as these letters are concerned that the United States Attorney here desires information with reference to individuals and particularly [253] when the United States Attorney did name individuals in connection with another case that I believe is pending in this court.

Mr. Neukom: I am not acquainted with that.

The Court: Yes, I think so. No, Mr. Neukom, I am going to sustain the objection.

Mr. Neukom: I don't wish to keep urging the matter, but I do sincerely believe that my point is well taken that when you ask for partnership matters and when it is——

The Court: You did not ask for a partnership matter.

Mr. Neukom: We asked for the Vernon Hotel and Restaurant Supply Company and when the factual proposition is that that is a partnership matter, is it necessary



for one government agency to write to another to go and explain each and every one of its factors when the truth of the matter is ascertainable and is known and is available in records that had been taken previously? Is it necessary for the government to go and set up from one of their inter-departmental memorandums all of those factual matters?

The Court: No. I will answer that very simply. Here you have asked for certain individual returns and I assume that the government is furnishing those to you, but when you don't ask for any, you omit entirely from your request certain others.

Mr. Neukom: I would agree if it was a corporation be- [254] cause we all know that corporations, entities change from day to day. In other words, you may be a stockholder today and you may not be tomorrow.

The Court: I will sustain the objection.

Mr. Strong: May I be heard?

The Court: No, I have heard enough. We will go on to the next matter.

Mr. Strong: May I withdraw this witness for the present time, your Honor, and recall him tomorrow?

The Court: Yes.

Mr. Strong: Mr. Eustice.

### JAMES BRYANT EUSTICE

called as a witness on behalf of the government, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your full name?

The Witness: James Bryant Eustice.

The Court: What is your business, Mr. Eustice?

The Witness: Internal Revenue Agent.

(Testimony of James Bryant Eustice)

The Court: How long have you been Internal Revenue Agent?

The Witness: About four years.

The Court: During all the time that is named in this indictment?

The Witness: Yes, sir.

The Court: All right, proceed.[255]

### Direct Examination

By Mr. Strong:

Q. Mr. Eustice, during 1945 did you in your official capacity have occasion to investigate the income tax returns of the Vernon Hotel and Restaurant Supply Company? A. Yes, sir, I did.

Q. And did you some time in the past, during the last year, receive authority from the Commissioner of Internal Revenue to give certain information in connection with that matter to the United States Attorney or his assistants? A. Yes.

Mr. McLaughlin: Well, that is objected to as a conclusion. I submit he has some written documents.

Mr. Strong: Yes. I am going to call for it now.

Q. Do you have that authority in writing?

A. Yes.

Q. May I see it?

A. Yes. (Handing document.)

Mr. Strong: Counsel will stipulate that this may be offered in evidence.

The Court: In evidence.

The Clerk: Government's Exhibit 56 received in evidence.

(The document referred to was received in evidence and marked as Government's Exhibit No. 56.)

[GOVERNMENT'S EXHIBIT NO. 56]

[Crest]      TREASURY DEPARTMENT

Office of                      Washington

Commissioner of Internal Revenue

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Address Reply to

Commissioner of Internal Revenue

and Refer to

GC:P:TCU

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Oct 10 1945

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Mr. J. Bryant Eustice,

Office of the Internal Revenue Agent in Charge,

Subway Terminal Building,

417 South Hill Street,

Los Angeles 13, California.

In re: Southern California Meat Company,

Southern California Meat Company No. 2,

Central Packing Company,

Vernon Hotel & Restaurant Supply Company,

Hyman Stillman,

Lou Segal or Siegal, and others

Los Angeles, California.

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Dear Mr. Eustice:

The Department of Justice has requested that you be authorized to cooperate with United States Attorney Charles H. Carr of the Southern District of California

(Government's Exhibit No. 56)

relative to criminal proceedings against the above-named corporations and individuals for alleged violations of the Emergency Price Control Act. The United States Attorney has asked that you be allowed to testify in the trial of the case and furnish pertinent information and documents in your possession. Mr. Carr states that a Grand Jury investigation is now in progress presumably at Los Angeles, California. It appears that your testimony and cooperation is desired with respect to certain information obtained by you while making a preliminary investigation of the Southern California Meat Company and the members of a partnership called the Vernon Hotel and Restaurant Supply Company.

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You are hereby authorized to cooperate with Mr. Carr, to furnish any pertinent documents to his office, and to appear in response to a subpoena in any criminal proceeding as a witness for the Government, testifying as to the facts discovered in your investigation and as to any other material circumstances of which you have knowledge and in respect to which your testimony may be desired by counsel for the Government.

Very truly yours,

Wm. T. Sherwood

feh

Acting Commissioner.

No. 18367 Cr. Gov. Ex. 56 in Evid. 6/19/46. Cross.

(Testimony of James Bryant Eustice)

Q. By Mr. Strong: And did you at any time during your [256] investigation prior to receiving the letter reveal any information to anyone outside of your agency?

A. No, sir, I did not.

Q. Now, in connection with your investigation, about when was that conducted?

A. Do you mind if I refer to my notes?

Mr. McLaughlin: I can't hear you.

The Witness: I asked if I might refer to my notes as to the time.

Mr. McLaughlin: I have no objection to Mr. Eustice looking at his notes to fix a time.

The Witness: My first contact with the Shubins was on August 7, 1945, in the special agent's office.

Q. By Mr. Strong: And was that contact in connection with your investigation of the Vernon Hotel and Restaurant Supply Company?

Mr. McLaughlin: That is objected to as calling for a conclusion.

The Court: Oh, no. Overruled. That is a very petty objection.

The Witness: Yes, it was.

Q. By Mr. Strong: And will you state the first time that you contacted any one of the defendants in this case in connection with your investigation of the Vernon Hotel and Restaurant Supply Company? [257]

A. The first date I went to their office was on August 11, 1945. I began the audit at that time.

Q. What was the purpose of your call at the office which you have just described?

A. It was to make an audit of the books and records of the Vernon Hotel and Restaurant Supply Company,

(Testimony of James Bryant Eustice)

as well as an income tax investigation as to the accuracy of the figures in the amended returns.

Mr. McLaughlin: Would you speak up, please?

The Court: Will you speak a little bit louder? Miss Bennallack, read the answer.

(Answer read.)

Q. By Mr. Strong: That was the returns of the Vernon Hotel and Restaurant Supply Company?

A. Yes, it was. It also included the individual returns.

Q. I show you Government's Exhibits 46, 47, 48 and 49 for identification, and ask you whether these are the returns that you referred to as the returns of the Vernon Hotel and Restaurant Supply Company. (Handing documents.)

A. Those are the partnership returns that were being audited, yes.

Q. On this first occasion when you went to the office of the Vernon Hotel and Restaurant Supply Company, who did you speak to then? [258] A. Well—

Q. Of the defendants, I mean, if any of them.

A. I believe the three of them were there at that time.

The Court: Will you speak a little louder so that everyone can hear you?

The Witness: I believe the three of the defendants were there at that time.

Q. By Mr. Strong: And did you have a discussion with any of the defendants concerning the returns or the income of the Vernon Hotel and Restaurant Supply Company?

A. You mean at that particular time?

(Testimony of James Bryant Eustice)

Q. Yes. A. Yes, I did.

Q. Now, did you have subsequent conversations with any of the defendants in that connection?

A. Yes, from time to time all during the audit and investigation.

Q. Can you state approximately how many times you spoke to one or more of the defendants in that respect?

A. Not specifically. The investigation was—

Q. I don't believe you heard my question. I asked you how many times. A. How many times?

Q. Yes, how many times you spoke to one or more of the defendants in that respect. [259]

A. All during the investigation?

Q. Yes.

A. Well, I was going to explain that the investigation went on for probably two months and I had occasion to speak to them several times a day. The other times, well, there might be several days then that I didn't speak to any of them but I just worked on the books or made outside investigations.

Q. These books that you speak of, where were you working on those books?

A. At their place of business.

Q. At the Vernon Hotel and Restaurant Supply Company?

A. Yes. To be technical it wasn't in their office. It was in Mr. King's office in that building. He let us use the office as they were cramped for space.

Q. And the books you examined were the books of the Vernon Hotel and Restaurant Supply Company?

A. Yes, they were.



(Testimony of James Bryant Eustice)

Q. Now, did you at any time during these investigations have any discussion with any of the defendants here concerning the source of income of the Vernon Hotel and Restaurant Supply Company during 1942, 1943 and 1944?

Mr. McLaughlin: That calls for a yes or no answer, Mr. Eustice.

The Witness: Yes, I did. [260]

Q. By Mr. Strong: And did you in the course of your investigation first investigate one or two or did you investigate them all? Were you investigating them all at once simultaneously?

A. Well, some features of it would be investigated all at once, but then there was an attempt to—

Mr. McLaughlin: Just a minute. I submit that the question has been asked and answered. He said "certain features" and I submit it is immaterial anyway whether he investigated them all at once or separately.

Q. By Mr. Strong: These conversations which you have referred to which you have had with these defendants concerning the income of the Vernon Hotel and Restaurant Supply Company, did they or any of them at any time tell you what the source of their income was?

Mr. McLaughlin: That is objected to as being leading, suggestive and hearsay—not hearsay, but leading and suggestive and immaterial.

The Court: What is leading and suggestive to just ask them if they did a certain thing when he could not possibly put in the mouth of the witness the answer he expects? How could he ask that question, counsel? I will overrule that. Proceed.



(Testimony of James Bryant Eustice)

The Witness: Yes. There was considerable additional income over what was reported on the original returns and in [261] answer to the question as to the source of that income which of course was necessary to ask, well—

Mr. McLaughlin: Just a moment. Your Honor, he is not stating a conversation now. He is stating something else.

The Court: Listen to the question and then answer it.

Q. By Mr. Strong: Can you fix the date as closely as you can of the first conversation that you had with any one of the defendants during your investigation which you received information from any of the defendants as to the source of their income of the Vernon Hotel and Restaurant Supply Company?

A. The approximate date, I can. It would be within the first day or two of the audit. It would be necessary.

Q. And who did you speak to?

A. Most of my conversations were with William Shubin.

Q. The defendant in this case? A. Yes, sir.

Q. And on this first conversation, will you state where it took place?

A. In the office where I was working.

Q. Who was present?

A. Well, the first time we had any conversations I believe to the best of my knowledge William Shubin and Frederick Shubin and probably Jack Kissel was there. We had so many conversations that— [262]

(Testimony of James Bryant Eustice)

Q. Mr. Eustice, would you mind my asking you again to speak up loud enough if you can. We can't hear you. I can't hear you back here.

A. Yes, I will.

Q. Do you recall what *yo* said and what answer you received from the defendant William Shubin on those occasions which you have described concerning the source of income of the Vernon Hotel and Restaurant Supply Company?

Mr. McLaughlin: Your Honor, before I make an objection I would like to ask permission of the court to ask Mr. Eustice a few questions on voir dire.

The Court: Proceed.

By Mr. McLaughlin:

Q. Mr. Eustice, in connection with the discussion that you have just stated you had, your purpose in having that discussion was to obtain information as supplementary to the returns of the Shubins. Is that right?

A. Yes, **sir**.

Q. And to incorporate that information in documents and records and file it with the Internal Revenue Department in connection with the Shubin returns?

A. Yes, **sir**. I would make a report.

Mr. McLaughlin: Your Honor, I submit that the question is an improper question and that it is an attempt to circumvent the rule which we have just been arguing here today, in [263] other words to put in evidence information which the government has obtained orally under their duties in obtaining information with respect to returns.

Mr. Strong: If your Honor please, there were being investigated the income tax returns of the Vernon Hotel

(Testimony of James Bryant Eustice)

and Restaurant Supply Company, the entity, the partnership, and also of the individual partners. The witness is being asked concerning the returns and his investigations relative to the Vernon Hotel and Restaurant Supply Company.

Now, it is probable that during the conversations and the investigations which were being carried on concerning the Vernon Hotel and Restaurant Supply Company which I may say parenthetically is the entity or the person whose books were being investigated because they were the books of the Vernon Hotel and Restaurant Supply Company, during this witness' investigation of those books and in the course of that concern as he was working on the books, he had conversations with the defendants which revealed the source of income and other matters concerning the Vernon Hotel and Restaurant Supply Company.

Now, of course I think it is obvious that those conversations must have had some connection with the charges in this case. Otherwise I would not be taking this time to bring them out, but the mere fact that the witness under the ruling of your Honor, based upon the authority in that letter, [264] cannot testify concerning matters which he obtained in questioning the defendants concerning their own income tax returns, I don't think in any way should preclude the witness' bringing out any information which he obtained in investigating the returns of the Vernon Hotel and Restaurant Supply Company.

The Court: I have held that. That was the specific request that you had authority for. That is perfectly all right.

(Testimony of James Bryant Eustice)

Mr. McLaughlin: That is as to Vernon Hotel and Restaurant Supply Company.

The Court: Yes, that is right.

Mr. McLaughlin: Your Honor, could I ask two more questions in view of that?

The Court: Yes.

Q. By Mr. McLaughlin: Mr. Eustice, were you questioning the Shubins and Mr. Kissel with respect to their personal income tax returns?

A. Well, the first thing I had to establish was the income of the partnership.

Q. Now, a partnership does not file a return that breaks down where they get their money, does it?

The Court: Well, it might or might not, counsel. We are all familiar with those returns. I am sure when you file your return you get your source mostly from the legal profession. [265]

Mr. McLaughlin: Your Honor, I am not an income tax lawyer either but I do know this and I think Mr. Eustice can describe it, that if individual partners file their own return and the partnership files a report so to speak, that such returns have been filed, and I would like to ask this witness to enlighten the court and the jury on the distinction between an individual return and a partnership return as it is referred to as to the distinction as to what they set forth generally.

The Court: All right.

The Witness: Well, the individuals only pick up their distributive share of the net income as shown on the partnership return. The amount of that income has

(Testimony of James Bryant Eustice)

to be ascertained from books and records of the partnership, and the partnership return should reflect the proper income of the operations of the partnership and the type of operations of that partnership.

Q. By Mr. McLaughlin: What is the form number of the partnership return? A. 1065.

Q. Now one of the purposes of your questions to the Shubins was to verify the amount shown on the partnership return as gross income or gross receipt. Is that right? A. That is correct.

Q. And another purpose of your questioning the defend- [266] ants was to ascertain their individual incomes?

A. Well, after it had been determined on the books of the partnership it was just a matter of making a distribution of that income.

Mr. McLaughlin: That is all I have, your Honor.

The Court: Proceed, counsel.

Q. By Mr. Strong: Then as I understand it, almost your entire audit and investigation related to the partnership, is that right? A. That is correct.

Q. And the income which you were questioning or auditing or investigating was the income of the partnership. Is that right?

A. Well, that was the large part of the income, from the partnership.

Q. Yes.

A. The other returns were also investigated for anything that might be on those individual returns.

Q. The books which you examined, whose books were they? A. The books of the partnership.

(Testimony of James Bryant Eustice)

Q. Did you ever examine any books of the individual defendants in connection with your investigation?

A. No, sir.

Q. Were any such books offered or shown to you?  
[267] A. They were not.

Q. So that the only books you examined at any time there were the partnership books?

A. The books of the partnership.

Q. And all your questions which you asked related to the reports on the books of the partnership?

A. Substantially all.

Q. And this conversation which I asked you about, the first conversation which you had which you gave the approximate date of as being a few days after you started the investigation, that conversation was with William Shubin?

A. Well, if you don't mind, I would rather clarify how these conversations would come about.

The Court: All right.

The Witness: During the course of an audit, well, we would run into certain items that we would want clarified, and then I would ask the questions about those whenever the partners were available, when they came into the office or maybe we would request them to come into the office and give that information, and it would almost always be on specific items in connection with the audit.

Q. By Mr. Strong: The audit of the books of the Vernon Hotel and Restaurant Supply Company?

A. Of the partnership, yes.

Q. Of the partnership. Now, going back to this first [268] conversation which you said you had a few

(Testimony of James Bryant Eustice)

days after you started with William Shubin, was that the first person you talked to?

A. Well, in answering that I meant it to be a general statement that our first conversations took place probably about two to three days after the audit. That is, I would have questions to ask regarding the income on the returns.

Q. What I am trying to get as closely as I can is the name of the defendant with whom you had the first conversation, if you recall.

A. Well, William Shubin, I believe, was the first one at that time.

Q. That is the best recollection you have?

A. Yes, sir.

Q. And do you remember as part of your conversation asking William Shubin about the cash which they had during 1943 in the partnership?

Mr. McLaughlin: I assume that is to be a yes or no answer.

The Witness: Would you mind stating the question again?

Q. By Mr. Strong: Yes. Did you discuss with Mr. Shubin the question of how much cash they had available during 1943 in the operation of the partnership?

A. Yes. I had some conversations.

Q. And did Mr. Shubin give you an answer to your [269] questions in that respect?

A. Well, during the year 1940—

Mr. McLaughlin: Pardon me, but you should answer that yes or no if you can instead of stating what he said.

The Witness: Could I have the question again, please?  
(Question read.)



(Testimony of James Bryant Eustice)

The Witness: Yes, he did. [270]

Q. By Mr. Strong: Did Mr. Shubin during that conversation indicate to you the source of the money which was being put into the Vernon Hotel and Restaurant Supply Company operations during 1943?

Mr. McLaughlin: That is a yes or a no, also.

A. Yes.

Q. By Mr. Strong: And will you tell us what Mr. William Shubin stated to you?

Mr. McLaughlin: Now, your Honor, we wish to object on the ground that it is not the—I will withdraw that ground—on the ground that it is immaterial and it is not tied down. There is no question that it is tied down to any particular item on this partnership return. In other words, if there is a number so and so on the partnership return that relates to the available cash that was used as capital, then I submit that possibly the question might be proper. But this is an indirect method of getting into evidence all the Internal Revenue Department obtained regarding the present Shubin operations.

The Court: Suppose he did not ask him about individual items. You are assuming that he did. This question is proper, if he told him anything about the source of his income. Proceed.

Mr Strong: Would you speak up in your answers, again, Mr. Eustice. [271]

A. All right. That is regarding the—I understand the question to be regarding the actual cash that came into the business during 1943.

Q. That is right.

A. Well, there was cash from two sources; it was from the payment of regular bills that had been sent



(Testimony of James Bryant Eustice)

out by the company, that is payment for merchandise billed at OPA ceiling prices.

The Court: That is what he told you? That is what he told you?

The Witness: That is what he told us in regard—

The Court: To the income?

The Witness: As shown up on the records.

The Court: All right.

The Witness: That is regarding a specific account.

The Court: All right.

A. And the other was cash that was from overcharges, that is charges made over the ceiling price that was paid mostly in cash.

Q. By Mr. Strong: And did he state to you at that time what had been done with this over-ceiling cash when it had been received in the first instances?

Mr. McLaughlin: The same objection I made to the last question; and I want to add to it the fact that there is no particular item of a book that is before this witness that [272] he is identifying, and all secondary evidence for that reason; and further, that the question is leading.

The Court: Overruled. Proceed. Repeat the question.

(Question read by the reporter.)

A. Well, when I was asking the defendants about cash—

The Court: Which one?

The Witness: William Shubin.

The Court: All right.

A. It was regarding specific items there.

Mr. McLaughlin: May I interpose an objection, your Honor?

(Testimony of James Bryant Eustice)

The Court: Yes. Specific items, now mention the items that you asked him about.

The Witness: Well, for instance, we would be making an analysis of an account like—I believe it is described as “additions and withdrawals to capital” and as to what that account was made up of; and that account was made up of both cash, then, that came in payment of regular—

Mr. McLaughlin: Wait. Is this witness testifying as to what Mr. Shubin said, or is he describing an account as to its contents? If he is attempting to do that, it is not the best evidence.

The Court: Well, you have not let him answer. Are you testifying to what Mr. Shubin told you?

The Witness: Yes. [273]

The Court: Yes. All right; proceed.

A. That is in answer to what the cash was that went into that account. Well, it was cash from two sources there and it was shown up on the books. There was so much cash received for the day; part of that cash was in payment of accounts receivable, which were credited to “accounts receivable”; part of it were cash sales which were credited to “cash sales”; part of it was from cash from overcharges that was credited to “advances and withdrawals.” That was the amount that would be picked up as additional income.

The Court: That is what he told you? That is what he told you?

The Witness: That is what he told us the account was made up of; yes.

The Court: All right; proceed.

(Testimony of James Bryant Eustice)

Q. By Mr. Strong: And did he at any time during that conversation disclose to you what they did with this cash which they received, where they kept it?

Mr. McLaughlin: Objected to as immaterial where they kept it and also as leading and suggestive.

The Court: It might go to the question of intent, counsel. Overruled.

A. It went into the regular business bank account.

The Court: What did?

The Witness: The money, cash. [274]

Q. By Mr. Strong: You mean the overcharges?

A. Yes.

The Court: What did he do with the other money; where did that go, the regular charges?

The Witness: It was all deposited at the same time.

The Court: Very well; proceed.

Q. By Mr. Strong: Did you have any conversations of this type with any of the other defendants during your investigation?

A. Well, there was conversations with all three of the defendants; there would have to be during the investigation, although most of the time the answers came from William Shubin; that is, the other defendants for the most part would not give a decisive answer on the operations of the business.

Q. But, were the other defendants present during these conversations?

A. At times, sometimes, yes; and sometimes, no. Sometimes I had conversation with the other partners and William Shubin was not there, either, but most of the information finally came from William Shubin.

(Testimony of James Bryant Eustice)

Mr. Strong: Your Honor, this witness is going to be on the stand for quite some time. I realize it is not quite five o'clock yet, but I was wondering if I could ask your Honor's indulgence to have an adjournment at this time so that I can re-arrange some phases of this questioning and [275] take less time later on? I had expected to put in other evidence at this time but I have not been able to in view of your Honor's ruling, and I think that a lot of time will be saved subsequently if I can organize this witness' questioning a little better. We had not anticipated using him so soon and I was going to use him tonight, myself.

The Court: Most of our courts here adjourn at 4:30. I have such a crowded calendar is the reason I have had to hold longer sessions.

(Whereupon, the court admonished the jury and an adjournment was taken until 10:00 o'clock a. m. of the following day, Thursday, June 20, 1946.) [276]

Los Angeles, California, Thursday, June 20, 1946,  
10:00 A. M.

The Court: Mr. Cross, call the calendar.

The Clerk: Yes, your Honor. No. 18367 Criminal, United States vs. William A. Shubin, Frederick Alexander Shubin and Jack L. Kissel for further jury trial as to all three defendants.

Mr. Strong: The government is ready.

Mr. McLaughlin: The defendants are ready and are all in court.

The Court: Stipulate that the defendants are in court?

Mr. McLaughlin: So stipulated.

(Testimony of James Bryant Eustice)

Mr. Strong: So stipulated.

The Court: Stipulate that the jury are present, gentlemen?

Mr. Strong: So stipulated.

Mr. McLaughlin: So stipulated.

Mr. Strong: Mr. Eustice.

JAMES BRYANT EUSTICE,

the witness on the stand at the time of adjournment, being previously duly sworn, was examined and testified further as follows:

Direct Examination (Cont'd)

By Mr. Strong:

Q. You are the same Mr. Eustice who testified here [279] yesterday?      A. Yes, sir.

Mr. McLaughlin: Mr. Strong, could I interrupt you just a moment?

If your Honor please, at this time and in the possible interest of saving time in this case I have a motion which I desire to make which is directed at the indictment in this case and proceedings before the grand jury, and I believe that the motion is well taken and if it is granted would end the case.

Now, I appreciate the fact that we are just starting here with a witness and I feel it would probably take a half hour to argue that motion. If your Honor wishes to hear it now or wait until later in the day it is agreeable with me. The only thing is that if it is good there is no need to proceed further with the witness.

(Testimony of James Bryant Eustice)

The Court: Well, I will hear it later. Proceed. [280]

Mr. Strong: Your Honor said you would hear it later?

The Court: Yes.

Q. By Mr. Strong: Now you were testifying yesterday concerning your investigation into the income of the Vernon Hotel & Restaurant Supply Company and concerning your discussions respecting that income with the various defendants in this case, as you recall. Now, about how long a time did you spend on the premises of the Vernon Hotel & Restaurant Supply Company in connection with this investigation of its income?

A. Well, the period of time covered a period of about two and one-half months.

Q. And how often were you there during that period?

A. On the premises?

Q. Yes.

A. Oh, I would say more than 50 per cent of the time.

Q. In conducting your investigation of that income whom did you question as to the income and its sources and various other facts which you were inquiring about?

A. Well, I had occasion to question any of the partners that would be there and available at the time.

Q. You mean the defendants in this case?

A. Yes.

Q. And did you always question one or more of the partners, the defendants? [281]

A. I don't understand that there is a difference between the question and the other question I just answered.

(Testimony of James Bryant Eustice)

Q. I was wondering whether you always directed your questions to them, or whether there were any other persons there whom you questioned in that respect?

A. At their office?

Q. Yes. A. No; not that I recall.

Q. Now, I don't understand your answer. Do you mean you do not recall questioning anybody else, or do you mean you do not recall what happened?

A. I do not recall anybody else being present in the office at the time.

Q. I see. So that all your questioning was of the three defendants? A. Yes, sir.

Q. And, as I understand your testimony, examination was into the source of the income of the partnership?

A. Yes; it was.

Q. As I understand, what you were concerned about primarily was the difference in the income reported on the amended income tax returns which are here in evidence of the Vernon Hotel & Restaurant Supply Company—the difference between the sums on the amended returns and the sums which had originally been reported, is that right? [282]

A. No; not exactly. My function was to determine the correct income of the partnership, irrespective of what was on the amended returns.

Q. I see. Did you discover that there was income which the partnership had derived during the years 1942, 1943, and 1944, which was not on the original income tax returns?

Mr. McLaughlin: If your Honor please, that is calling for a conclusion and it is not the best evidence and it is immaterial.



(Testimony of James Bryant Eustice)

The Court: Repeat the question, please.

(Question read by the reporter.)

The Court: Overruled.

A. Yes; I did.

Q. By Mr. Strong: And how much was the sum for the three years which was not reported on the original income tax returns?

Mr. McLaughlin: Again, your Honor, we object on the ground that it is immaterial, calling for a conclusion, and is not the best evidence.

The Court: Overruled.

Mr. McLaughlin: May the record show that the witness is looking at some notes now and apparently is refreshing his recollection?

The Court: Yes.

Mr. McLaughlin: And before he answers, your Honor, I [283] think that there should be some foundation laid as to what he is looking at, if he is going to testify from some notes.

The Court: That is correct.

Q. By Mr. Strong: Have you at present no exact recollection of the amount that I asked for?

A. I can tell you, yes, approximately within probably two or three thousand dollars.

Q. Without refreshing your recollection?

A. Yes, sir.

Q. Would you do so, please?

Mr. McLaughlin: The same objection that I made to the previous question, immaterial and not the best evidence.

(Testimony of James Bryant Eustice)

The Court: He may answer.

A. About \$144,000. [284]

Q. This sum of \$144,000, did you discuss that sum with the three partners, the three defendants in this case, or any one of them?

A. Not that particular sum, but the items that made up that sum.

Q. In other words, you took separate items which you questioned them about? A. That is correct.

Q. Which ultimately totaled the sum that you just gave us? A. Yes, sir.

Q. Which of the three defendants did you talk to about that money?

A. Well, during the examination I had as I have mentioned occasion to talk to all of them. Most of the conversation was with William Shubin.

Q. But you did talk to all three of them?

Mr. McLaughlin: Your Honor, that question has been asked. It was asked yesterday.

The Court: Yes, and asked again today and it has been asked twice now. Proceed, counsel.

Q. By Mr. Strong: Did the defendants state to you the source of this \$144,000 of partnership income?

Mr. McLaughlin: That is objected to on the ground that it is calling for a conclusion and does not state the times, [285] places, parties present or who said it, and further that it is immaterial.

The Court: The first part of the objection, of course, is frivolous. The rest of the objection is good. Lay a better foundation.

(Testimony of James Bryant Eustice)

By Mr. Strong:

Q. Did you discuss with the partners these various items that you mentioned as making up the total amount ultimately on any one occasion or on different occasions?

A. On different occasions.

Q. And did you discuss separate items on separate occasions?

Mr. McLaughlin: That is objected to as having been asked and answered.

The Court: He said he had. Counsel, he has answered these questions. He said he had discussed it with all the defendants several times.

Mr. Strong: All right, your Honor.

Q. Will you state, giving the date if you can as closely as you can, and stating the place where the discussion took place and giving the names of the persons present and stating who it was of the defendants with whom you discussed the matter——

The Court: And what they said.

Q. By Mr. Strong: And what they said beginning with [286] the first time and going through each of the incidents.

Mr. McLaughlin: Now, your Honor, I just want to make an objection in view of the fact that he has also asked for the conversation. I want to object on the ground that it is immaterial and is not the best evidence.

The Court: What would be better evidence than their oral statements?

Mr. McLaughlin: Your Honor, I am going to submit to your Honor's ruling on it. I don't care to argue it.

The Court: No. I want to know. I want to be advised. If there is better evidence than the oral statement

(Testimony of James Bryant Eustice)

I want to know what it is. You say it is not the best evidence. Now, if there is better evidence than an oral statement I want to know what you have in mind.

Mr. McLaughlin: I can't tell yet what is going to be said, your Honor. I don't know whether they are going to talk about the contents of books or what.

The Court: Well, so far he has just asked him what was said. He hasn't asked about books or records. All right, proceed.

Q. By Mr. Strong: Would you go ahead, please?

A. Well, in order to determine the——

The Court: No. The first question is fix the time as near as you can.

The Witness: Well, the first conversation we had was [285] probably two or three days after the audit began.

The Court: Now when did the audit begin?

The Witness: August 11, 1945.

The Court: All right. Now, where was this conversation?

The Witness: In the same building that the partners had their place of business; that is the Vernon Hotel and Restaurant Supply Company.

The Court: Now, who was present?

The Witness: William Shubin, Frederick Shubin and possibly Jack Kissel.

The Court: You are not sure about Jack Kissel?

The Witness: No.

The Court: All right, go ahead. What was said?

The Witness: Now, that is hard on this to—that is bringing out one particular conversation as the particular date. During the course of the audit questions were being

(Testimony of James Bryant Eustice)

asked continuously as the items came up. It is hard to explain and it is easier to say that the conversations were had with William Shubin or various other members of the partnership at different times during the audit and what they said during those conversations.

The Court: Well, the question is to the best of your recollection what was the conversation at the first conference when you discussed these matters.

The Witness: Well, our first discussion I believe was on [288] the method of handling the overcharges that were made on the sale of meat.

Mr. McLaughlin: Your Honor, I move to strike that statement.

The Court: It may go out. That is a conclusion of yours. You must state as near as you can what you said and what they said, if you had any conversation, and who spoke.

The Witness: Well, I questioned the partners regarding this account called Additions and Withdrawals to Capital, as to what that account was made up of.

The Court: Now, who did you address that question to?

The Witness: William Shubin was one.

The Court: What did William Shubin reply?

The Witness: That that account had been used for recording cash that was received from overcharges.

The Court: Was anything else said in that conversation?

The Witness: Well, he was questioned as to the manner in which that cash was accumulated or put into that account. The answer was that as the cash was accumulated it was accumulated and was kept some place at the

(Testimony of James Bryant Eustice)

taxpayer's residence and from time to time as they needed the money in the business for the business operations it was deposited to their business bank account and the credit was to this account, additions and withdrawals from capital.

From time to time they withdrew money from the business [289] and charged it against this account. That money that was withdrawn was deposited, some of it, to their personal bank accounts. Sometimes it would be put back into the business in this same account.

The Court: Proceed, Mr. Strong.

Q. By Mr. Strong: Did William Shubin during that conversation disclose to you the source of this money?

Mr. McLaughlin: That is objected to as leading and suggestive and immaterial.

The Court: Leading and suggestive? I don't know how you can ask it any other way. Immaterial of course is always a proper objection if counsel feels it is. Overruled and exception allowed.

The Witness: Well, the source was from cash receipts from overcharges.

The Court: That is what he said, was it?

The Witness: Yes, sir.

Q. By Mr. Strong: Did he say what overcharges?

Mr. McLaughlin: The same objection, your Honor.

The Court: All right. Overruled.

The Witness: Yes, from the sale of meat.

Q. By Mr. Strong: Now, do you recall the second time that you had any conversation with any one of the defendants concerning the source of income or the income of the Vernon Hotel and Restaurant Supply Company? [290]

(Testimony of James Bryant Eustice)

A. Well, I had another discussion of another account used for a similar purpose during the year 1944. That is, this account was used during the year 1944. [191]

Q. When did the discussion take place and where and who was present and what was said by you and the person whom you were addressing?

A. Well, this account was——

Mr. McLaughlin: Just a minute. Did he say he was addressing William Shubin on this occasion?

The Court: He has not stated yet.

Mr. McLaughlin: Well, I object on the ground there is not a proper foundation.

The Court: Lay a further foundation.

Q. By Mr. Strong: Would you please answer my question as to when, where, and with whom you spoke on that occasion, first, before you go into the conversation itself?

A. Well, the exact time—I can only approximate.

The Court: That is all you have to do.

A. It was during the first part of the examination.

Q. By Mr. Strong: Can you give the month and the year?

A. Well, the month would be August.

The Court: What year?

The Witness: 1945.

Q. By Mr. Strong: And where was it?

A. In the building where the Vernon Hotel & Restaurant Supply Company had their place of business.

Q. And who was present? [292]

A. Both William and Fred Shubin, and at the time that this account that I was going to discuss—there was naturally several discussions on it.



(Testimony of James Bryant Eustice)

Q. Well, taking just this one that you are referring to, taking the first discussion, will you state what you said to either William or Fred Shubin and what they said to you?

A. Well, my discussion on that account would be questioning regarding items in that account as they came up during the examination, as to what the account was used for, and any particular items that were in that account.

Q. And were you still investigating into the source of the income of the Vernon Hotel & Restaurant Supply Company?

A. Yes, sir.

Q. And were your questions on this occasion directed toward that end?

A. Yes, sir.

Mr. McLaughlin: Your Honor, that question has been asked and answered.

The Court: Yes.

Mr. McLaughlin: There is no question but what they were investigating it.

The Court: It has been asked and answered, Mr. Strong.

Mr. Strong: I want to be sure, your Honor, in each instance, that he is talking about the Vernon Hotel & Restaurant Supply Company account, rather than the individual [293] in view of your Honor's ruling.

The Court: I think that is correct. It must be shown that the conversation is directed to a particular subject. All right.

A. As far as persons present, I have omitted, probably, in the other conversations to state that at all times or substantially at all times Special Agent Samuel J. Phoebus was present during these conversations.

(Testimony of James Bryant Eustice)

Q. Now, going into the conversation on this occasion which you have just told us about, will you state what the conversation was, what you asked and what was answered to you?

A. Well, the discussion on that was had with all three was deposited to this account.

Q. And what were you told and by whom?

A. And I was told that the money that went into this was from overcharges made from the sale of meat.

Q. Who told you that?

A. Well, I asked as to the source of the money that partners there.

Q. On this occasion?

Mr. McLaughlin: Your Honor, I move to strike the last two answers unless the witness can testify who told him that.

The Court: Well, if they were all three present there, I do not believe, counsel, that on the first count of the [294] indictment it is necessary to identify the particular individuals. It goes to the weight of the testimony, because, under the first count, they would all be bound.

Mr. McLaughlin: Your Honor, just may I make this further observation?

The Court: Yes.

Mr. McLaughlin: If he cannot do it, if he cannot recall, I think the record should show whether he can recall who said it.

The Court: Oh, yes; that is right.

Q. By Mr. Strong: If you can remember who said it, please state his name; if you can't, state that you do not remember.

(Testimony of James Bryant Eustice)

A. Well, as I have mentioned before, definitely, that all my conclusions were, I believe, or substantially all of them regarding the business, were discussed with William Shubin. My discussion with other partners—well, I was usually referred back to William Shubin for the answer; that they did not ordinarily take the responsibility of giving me the answer to any of these problems.

Q. And on this occasion which you have just discussed, do you recall who it was that gave you the answer which you have stated?

A. Well, I got the answer from William Shubin, as on most other phases. [295]

Q. And that was in the presence of what other partners, if any?

A. Well, I recall that this account was discussed during the presence of Fred Shubin. I wouldn't say definitely whether Jack Shubin was in the office at that particular time—or, I mean Jack Kissel.

The Court: In this conversation did you have any specific item or amount that you had before you?

The Witness: Yes; we had this particular account that we were making an analysis of, the exchange account here.

The Court: All right.

The Witness: I can——

Q. By Mr. Strong: And was he——I am sorry.

The Witness: ——from my work papers I can tell you the figures of additional income that were determined in that particular account.

Q. You mean you can't recall without refreshing your recollection from the work papers?

A. Well, I can recall approximately.

(Testimony of James Bryant Eustice)

Q. If you can recall without refreshing your recollection, will you state the approximate amount which you were questioning?

Mr. McLaughlin: To which we object as immaterial.

The Court: Overruled. The question is: Was there some sum of money that you were asking the defendants about? [296] That is very clear. Do you remember approximately the amount?

The Witness: Yes; I can say almost definitely it was \$46,000.

The Court: All right.

Q. By Mr. Strong: And was that the amount concerning which you got the answer from William Shubin that you testified to before?

A. That is correct.

Q. Now, do you remember the next occasion when you had a conversation with any of the three defendants here concerning the income of the Vernon Hotel & Restaurant Supply Company and the source of that income?

A. As to dates, no. As to specific items—well, they were questioned regarding other expenditures of this money that was received. In other words, it was not necessarily that all of this cash would be deposited into the business; it might have been used for personal expenses or for other business investments outside of the business.

Q. Let me ask you as to specific items and possibly that will assist you in fixing the date, the place and the time. Did you ever have a conversation with the defendant Jack Kissel concerning his personal bank account at the Citizens National Bank and respecting a deposit for \$500.00 which was made to that account on or about November 18, 1943? [297]

A. Yes.

(Testimony of James Bryant Eustice)

The Court: Just yes or no. A. Yes, sir.

Q. By Mr. Strong: And was that questioning in connection with your investigation into the income and the source of the income of the Vernon Hotel & Restaurant Supply Company? A. It was.

Q. And do you recall when this conversation with Jack Kissel took place—approximately, if you do not remember the exact date?

A. Yes. About, probably, during the middle of the audit after we had had time to make a transcript and analyze the——

Q. Can you fix a date by month and day, if you can, and year? A. No; I couldn't.

Q. Rather than the middle of the audit.

A. Well, I would say sometime in September.

Q. Of what year? A. 1945.

Q. And where were you discussing this?

A. In the office where we were making the audit.

Q. And who was present?

A. Well, Jack Kissel was present and Special Agent [298] Phoebus.

Q. And what did you say to Mr. Kissel and what did he answer to you?

Mr. McLaughlin: Now, your Honor, before that question is ruled on, may I ask the witness a question on voir dire?

The court: Yes.

Q. By Mr. McLaughlin: Mr. Eustice, when you were having this conversation with Mr. Kissel you were also eliciting information for use in preparing a matter in connection with Jack Kissel's personal income tax return, were you not?

(Testimony of James Bryant Eustice)

A. Not at that time, except as it would be transferred from the income that was determined for the partnership. At this time I was determining the income of the partnership, the Vernon Hotel & Restaurant Supply Company.

Q. But the information you were obtaining was also to be used in connection with Jack Kissel's personal returns?

A. The income of the partnership would be used on his personal return.

Q. And the information you were seeking could be used also?

A. I don't understand your last question.

Q. Well, Mr. Eustice, the information that you were seeking to elicit was to determine whether Jack Kissel owed the Government any income tax or penalties, as well as the [299] Vernon Hotel & Restaurant Supply Company, Wasn't that right?

A. That came within the scope of the audit; yes.

Mr. McLaughlin: Your Honor, I make the objection on the ground that it is privileged and it is a circumvention of the statute and the regulation which we had to deal with yesterday.

The Court: We are not going into his personal income. The fact that it happens to be in these books, that is no reason to exclude it. In other words, if he looks into an account and sees a withdrawal of \$5,000, we are not going into whether that was a proper withdrawal or not. We are not going into that, as I ruled yesterday. But you cannot deny the admissibility of this testimony, when it is found in a partnership account and the partnership is being reviewed and its figures being reviewed. Objection overruled, exception allowed. Proceed.

(Testimony of James Bryant Eustice)

Q. By Mr. Strong: Will you now state what you said to Mr. Kissel on the occasion which you have just described and what Mr. Kissel said to you? And please speak up.

A. Well, I asked him if that was income from—or, I mean, if the monies that he deposited were received from overcharges or any other source of income. He stated that it was part of the overcharges.

Q. Did he tell you what overcharges?

A. He didn't need to tell me. [300]

The Court: No, no, no. Now, just what he said, you know, if he said anything; just what the discussion was.

A. I don't recall that he named that specifically.

Q. By Mr. Strong: Now, again, I do not want to keep repeating, but I am asking you simply concerning your investigation into the income of the Vernon Hotel & Restaurant Supply Company and into the source of that income. All my questions are directed only toward that.

A. I understand.

Q. And please bear that in mind. In that connection and in connection with that investigation did you ever have occasion to speak to the defendant William A Shubin concerning his purchase of a trust deed in October, 1943, and certain clothes during that year?

A. Yes; I had. [301]

Q. Will you state approximately when that conversation took place, where it took place, and who was present?

A. I would say it took place the latter part of September with William Shubin present.

Q. What year? A. 1945.

Q. And where was it?

A. And Samuel J. Phoebus, special agent, present in the office where I was making the audit.



(Testimony of James Bryant Eustice)

Q. And will you state what was said to Mr. William Shubin and what he said to you in that connection?

Mr. McLaughlin: Your Honor, I would like to have an objection noted on the ground of immateriality and on the ground that it is without the scope of the issues in the case.

The Court: Overruled. Proceed.

The Witness: Well, I asked Mr. Shubin if that was where he obtained the money where it was invested in this property and he stated it was part of the money received from overcharges he had made on the sale of meat.

Q. By Mr. Strong: Sales of meat as an individual?

The Court: Just what he said, that is all we want and the court and the jury will draw conclusions. You say he said these were from overcharges for meat. Was anything else said? [302]

The Witness: No.

The Court: All right. Proceed.

Q. By Mr. Strong: Did you speak to him about the purchase of some clothes during 1943?

Mr. McLaughlin: That is objected to—well——

The Court: Just yes or no to that question. Do you remember at any time mentioning the purchase of clothes?

Mr. Strong: On this occasion is what I am referring to.

The Court: All right.

The Witness: I don't know whether I can give you a yes or no answer on that.

The Court: Well, go to the next question then.

Q. By Mr. Strong: How much money was the sum that Mr. Shubin told you he had obtained from the over-

(Testimony of James Bryant Eustice)

charges on meat in connection with the trust deed that you have just discussed?

Mr. McLaughlin: Objected to as leading.

The Court: Yes. That question is not proper. Repeat the question, Miss Bennallack.

(Question read.)

Mr. Strong: I will reframe it.

The Court: Very well.

Q. By Mr. Strong: Did Mr. Shubin on the occasion of the discussion which you have just described state to you how much money if any was invested by him in this trust deed? [303]

Mr. McLaughlin: Objected to on the ground that it is immaterial.

The Court: Overruled.

The Witness: I already knew the amount and I would be asking him where he received it.

Mr. McLaughlin: That should be a yes or no answer, Mr. Eustice; did he or didn't he.

The Court: Was the amount stated by either you or by him in that conversation?

The Witness: It was stated by me.

The Court: To him?

The Witness: Yes, sir.

The Court: All right, go ahead.

Q. By Mr. Strong: What was the amount?

A. I don't recall without referring to my notes.

The Court: All right, refer to your notes if you don't recall without them; and lay a better foundation before the notes can be used.

(Testimony of James Bryant Eustice)

Q. By Mr. Strong: Are these notes made by you, these notes that you are referring to?

A. Yes, sir.

Q. Will you state what they are and when you made them?

A. The ones I am referring to now are papers that I made during the course of the audit.

Q. And the material contained on those notes was ob- [304] tained by you from what source?

A. Some of it from the books and records of the Vernon Hotel and Restaurant Supply Company and some from outside sources from where the partners did business, at their banks, or any other place where we may have had occasion to investigate their income.

Q. Did you obtain any of that information from the defendants that is on your notes?

A. Yes, some of it.

Q. And at the time you made these notes which you are looking at now was the information contained on the notes then fresh in your memory?

Mr. McLaughlin: Just a moment. Your Honor, I think we are taking up a lot of time on this and I don't think it is proper to use the notes, but I have no disposition to circumvent counsel getting in the amount of that trust deed, subject to my objection that it is immaterial, and if he knows what it is he can state it, subject to my objection.

The Court: Subject to your objection that it is immaterial, what is the amount, Mr. Strong?

Mr. Strong: \$600 is the sum that they were discussing.

Mr. McLaughlin: That was the trust deed that was stated by Mr. Shubin?

(Testimony of James Bryant Eustice)

Mr. Strong: I can't go into details. I can only state what the amount was that was being discussed. It was \$600.00, [305] Mr. Shubin's share of the trust deed.

The Court: Proceed to the next question.

Q. By Mr. Strong: Did you at any time discuss with the defendant Frederick Shubin the question of the source of the funds which he used to purchase the trust deed which we have just discussed?

A. Yes. My memory is that both Fred and William were present at the time that discussion of the trust deed took place.

Q. You mean they were both present on the occasion you have just discussed?

A. The time the trust deed was discussed, yes.

Q. And what did you ask Mr. Frederick Shubin and what did he tell you about those funds?

A. Well, it was the same question there and the trust deed was as I recall now actually \$1200 and why it is divided there is that both William Shubin and Fred Shubin had one-half interest in the trust deed and they were questioned as to the source of the funds that were used as an investment in that trust deed, to which the answer was that it was from money received from overcharges.

Q. Is that the answer of both or just one?

A. Of both.

Q. Did you at any time in connection with your investigation as to the source of the receipts of the Vernon Hotel [306] and Restaurant Supply Company question the defendant Jack Kissel concerning the purchase of a 1942 Pontiac?

The Court: Just answer the question yes or no.

(Testimony of James Bryant Eustice)

The Witness: I don't recall any direct conversation on it.

The Court: All right, the next question.

Q. By Mr. Strong: Can you look at your notes and see if they refresh your recollection?

A. No. I can tell you how the items were arrived at——

The Court: No, that is not the question, not how you arrived at it, but whether or not you had any discussion with Jack Kissel with reference to a Pontiac car. Now, was that subject ever discussed with him that you remember?

The Witness: No. I recall that so far as that item was concerned it wasn't necessary to discuss it.

The Court: All right. Proceed to the next question.

Q. By Mr. Strong: Did you at any time discuss with any of the defendants, particularly Jack Kissel, the question of the source of the funds used to purchase a 1938 Chevrolet truck?

A. The same answer applies to that as to the other.

The Court: Next question.

Q. By Mr. Strong: Directing your attention to the sum of \$1,713 and the sum of \$1,200, did you at any time have any discussion with the defendant Jack Kissel as to the source [307] of those two sums, and you can use your notes if you don't remember.

Mr. McLaughlin: I think the witness should first state that he doesn't remember independently.

The Court: Yes, that is right. First, have you any independent recollection of this transaction without referring to your notes that enables you to testify?

(Testimony of James Bryant Eustice)

The Witness: I don't recall what those particular items were applicable to.

The Court: All right.

Mr. Strong: I didn't hear the entire answer. May I have it read, your Honor?

The Court: Yes. Miss Bennallack, read the answer.  
(Answer read.)

Q. By Mr. Strong: Did you at any time discuss with the defendant Frederick Shubin—are you looking up your notes?

A. Yes, I was looking up my notes.

Q. By Mr. Strong: I will withdraw the question.

Would you look at your notes and see if they refresh your recollection as to the item I mentioned in the previous question?

A. Those items occurred in 1943 or 1944?

Q. November of 1943. A. No. [308]

Q. Well, I think we will save time by just dropping that. A. I have the item here——

Mr. McLaughlin: Just a moment. The only purpose of looking at the notes is to refresh the memory. Is that correct, your Honor?

The Court: That is right.

Q. By Mr. Strong: Will you state if the notes refresh your memory and then testify from your memory rather than from your notes?

A. Well, the item covers purchase of a Pontiac automobile by Jack Kissel during that period of time.

Q. Did you discuss with Jack Kissel the purchase of that automobile? Just yes or no.

A. I think all these personal items were discussed some time during the audit.

(Testimony of James Bryant Eustice)

Q. Did you ask Mr. Kissel as to the source of this sum?  
A. Yes, sir.

Q. What did he say to you and what did you say to him or the other way around, what did you say to him and what did he say to you?

A. Well, my question was always as to where the funds came from that were used for these particular items and the answer was that they were part of the cash received from overcharges. [309]

Q. Is that what Mr. Kissel told you on this occasion that you are referring to?  
A. Yes.

Q. Now, did you at any time discuss with the defendant Frederick Shubin in connection with your investigation of the income of the Vernon Hotel and Restaurant Supply Company, did you discuss with Frederick Shubin at any time the sum of \$1,000 which had been desposited in the Citizens National Bank to the account of Frederick Shubin and J. D. Johnson?

A. Yes, sir.

Q. And when did you have that discussion and where did it take place and who was present?

A. The conversation would have taken place some time in September, probably the first part of September in the office where I was making the audit.

Q. What year? The year is important too.

A. 1945.

Q. And who was present?

A. Frederick Shubin and Special Agent Phoebus.

Q. Do you remember what you said to Frederick Shubin and what he said to you in that connection respecting this item?



(Testimony of James Bryant Eustice)

A. Well, I questioned him respecting the source of the funds from which he made the deposit, to which his answer was that it was part of the cash received from overcharges. [310]

Q. Did he say it in those words?

Mr. McLaughlin: Just a moment. Your Honor, I think it has been asked and answered, but I am the one that——

The Court: I think it has been. Proceed, counsel.

Q. By Mr. Strong: Did you at any time in your investigation of the income of the Vernon Hotel and Restaurant Supply Company discuss with any one or all of the defendants the exchange account of that partnership?

A. Yes, I did.

Q. Can you state approximately when, where and who was present at the conversation?

A. That was just discussed during the early part of the audit. That must have been in August of 1945 at the office where I was making the audit.

Mr. McLaughlin: Wasn't that gone into yesterday afternoon, the exchange account?

The Court: I don't think so. I don't remember.

Mr. Strong: I don't recall that it was.

Mr. McLaughlin: I am not positive, but I think Mr. Strong mentioned that account.

The Court: No, I think not. It has not been mentioned up to date. Proceed.

Q. By Mr. Strong: And was there any particular figure that you were discussing?

A. I believe that was the figure of \$46,000 that I mentioned back a while ago, that is in our earlier session.

(Testimony of James Bryant Eustice)

Q. I don't recall whether you stated who of the defendants was present at that conversation.

A. William Shubin and Frederick Shubin, I believe.

Q. And what did you say to them and what did they say to you, if anything?

Mr. McLaughlin: If your Honor please, he has now tied it down to the \$46,000 which he has already gone into this morning.

The Court: No, he just mentioned it. He never made any other comment except to mention the amount. I asked him if there was some comment and he said that was all. Proceed.

The Witness: Yes. The partners were questioned regarding the source of the funds that were deposited to the credit of the exchange account and they had stated that it was cash received from overcharges which was with the exception of a few—that is, some items that were specifically referred to in that account.

Q. By Mr. Strong: Do you recall the amount of money involved in these items which you say were excepted to?

A. One item was an exchange check of I think——

Q. Just the total sum if you can give it.

A. About \$4,000.

Q. Did you at any time during your investigation into the income and source of income of the Vernon Hotel and [312] Restaurant Supply Company discuss with the defendant William Shubin the sum of approximately \$11,500 in cash? A. Yes.

Q. Can you state about when the discussion was held, where it was held, and who was present?

(Testimony of James Bryant Eustice)

A. Well, I remember that item was particularly discussed during the latter part of the audit which must have been the latter part of September or the first part of October 1945 and at which time, well, William Shubin was being questioned regarding the amount of cash that he had on hand.

The Court: Was anyone else present?

The Witness: Special Agent Phoebus.

The Court: Is that all?

The Witness: That is all I recall.

The Court: All right.

Q. By Mr. Strong: What did you say and what did Mr. Shubin reply?

A. Well, he stated to the best of his recollection that was the amount of cash that he had on hand that was undeposited cash from money received from overcharges.

Q. Did you at any time during your investigation into the source of the funds of the Vernon Hotel and Restaurant Supply Company discuss with the defendant William Shubin the sum of approximately \$5,288 which had been deposited to the personal bank account of William Shubin and Julia T. Shubin? [313]

A. Yes, I did.

Q. Will you give the date, the place, and the persons present?

A. William Shubin was present and Special Agent Phoebus.

Q. The date?

A. It must have been some time in September of 1945.

Q. And the place? A. In the office.

Q. Will you state what was said to William Shubin and what he said to you concerning this item?

(Testimony of James Bryant Eustice)

A. Well, I asked Mr. Shubin as to the source of the funds that were deposited to that account and he stated—I don't recall at the time whether that was all the money that was in that account or not, but that that particular amount was from cash received from overcharges and I believe he also stated at that time that that was part of the cash on hand, but because I don't believe that was the determination I made in my audit because of the fact that——

Q. Just what he said and what you said.

A. Oh, I beg your pardon.

Q. Did you at any time discuss with the defendant William A. Shubin the sum of approximately \$14,254 which had been deposited to the personal bank account of William Shubin?      A. Yes, sir. [314]

Q. Will you give us the date, place and the persons present?

A. Well, the date would be probably the same time or approximately the same time as the discussion on the other bank account, some time in September of 1945 in the office where I was making the audit and in the presence of Special Agent Phoebus.

Q. What was said by you and what was said by Mr. Shubin?

A. Well, I questioned Mr. Shubin as to the source of these funds and he stated that that was part of the money that was received from overcharges.

Q. Did you at any time discuss the question of the sum of \$15,314 which had been deposited to the personal bank account of the defendant Frederick Shubin?

A. Yes, sir.

(Testimony of James Bryant Eustice)

Q. Will you give us the date, the place and the persons present?

A. These bank accounts were all discussed around approximately the same time in September of 1945 and in the presence of—that is, with Frederick Shubin in this particular case and in the presence of Special Agent Phoebus.

Q. And what was said by you as to the sum of \$15,314 and what was said by the defendant Frederick Shubin?

Mr. McLaughlin: Your Honor, before that question is [315] answered I would like to ask a question on voir dire.

The Court: Proceed.

Q. By Mr. McLaughlin: Mr. Eustice, on any of the conversations that you had with any of the defendants at this place of business, did you tell them that what they told you might be used against them in any criminal proceedings?

Mr. Strong: I don't think that is material, your Honor.

Mr. McLaughlin: I want the record to show it anyway. [316]

Mr. Strong: I don't think that is material, your Honor.

Mr. McLaughlin: I want the record to show it, anyway.

Mr. Strong: I object to that question, your Honor.

The Court: I will permit the question in order to protect the record. Counsel should be careful and have the record protected. Do you understand the question?

The Witness: Yes, sir. I don't recall at any time.

(Testimony of James Bryant Eustice)

Q. By Mr. McLaughlin: You have no recollection of ever having cautioned them that the things that they told you might be used against them in some proceeding brought by the Government?

A. No; not regarding these particular items. Whenever they came up, I just asked the questions which I was authorized to do.

Q. Yes.

A. In an income tax investigation. I didn't warn them at every time that that might be used in another investigation.

The Court: Now, you qualified that. You say you did not warn them every time. Did you warn them at any time? That is what counsel is interested in. Did you warn them at any time?

The Witness: I didn't warn them at any time.

The Court: All right; proceed.

Mr. McLaughlin: Your Honor, just to go further in the [317] record protecting, I move to strike the testimony that this witness has given as to discussions with the defendants on the ground that they were not cautioned as to what purpose the information they gave would be used, or whether it would be used against them.

Mr. Strong: Your Honor, I might state at this time that I will prove that the defendants were warned, were cautioned and were told that any information they gave during this investigation could be used against them in any subsequent proceeding; that at the time they were cautioned their attorneys were present and they consulted with their attorneys. And I shall also show that the investigation, the portion of the investigation conducted

(Testimony of James Bryant Eustice)

by this particular witness, followed another portion of investigation which preceded this and prior to which the warnings were given as I have stated.

The Court: Overruled, exception allowed the defendants. Proceed.

Mr. McLaughlin: May I have a stipulation that I object to further questioning of this witness on the grounds that I made my motion just a moment ago, so that I won't have to make an objection every time?

The Court: It is so understood, and motion to strike denied. Proceed.

Mr. Strong: Is there an unanswered question, Mr. Reporter? [318]

(Question read by the reporter.)

The Witness: I didn't answer that question?

The Court: No.

A. Well, I questioned in the case of Fred Shubin. That was Fred Shubin?

The Court: Yes.

Mr. Strong: That is right.

A. I questioned Fred Shubin as to the source of the funds he had deposited to his personal bank account, and he had replied that it was part of the cash received from overcharges.

Q. Did you at any time discuss with the defendant Jack Kissel the sum of approximately \$6,000 which had been deposited in his personal bank account?

A. That was also discussed during the investigation.

Q. And will you give us the date, the place, and the persons present?

A. They were all discussed about the same time, sometime in September, 1945, in the office where I was making



(Testimony of James Bryant Eustice)

the audit, in the presence of Jack Kissel and Special Agent Phoebus.

Q. Will you state what you said to Jack Kissel about this sum of \$6,000 and what he said to you?

A. He was also asked what the source of those funds were, at which he had advised us that that was part of the [319] cash received from overcharges.

Q. Did you at any time discuss with the defendant William A. Shubin the sum of \$6,688, approximately, that he spent in connection with personal expenditures?

A. In connection with those personal expenditures, they had already been set up and unless there was any difference in them, well, I accepted the figures that they had previously submitted.

Q. You are talking about the income tax activities. I am only interested in the conversations between you and the defendant.

The Court: Do you remember any conversation with William A. Shubin with reference to that item of \$6,000-odd personal expenses? Did you discuss it with him?

The Witness: I don't remember that it was necessary to; that there was any discussion on that particular item.

The Court: All right.

Q. By Mr. Strong: Did you discuss at any time with the defendant William Shubin in connection with your investigation of the Vernon Hotel & Restaurant Supply Company's income—did you discuss with the defendant William A. Shubin the question of some \$6,000 which had been used by him in 1944 to purchase a residence?

A. Yes, sir.

The Court: To purchase what? [320]

Mr. Strong: A residence.

(Testimony of James Bryant Eustice)

The Court: All right. A. Yes; I did.

Q. By Mr. Strong: Will you give us the date and the place and who was present at that discussion?

A. It was during the latter part of the audit. It must have been the latter part of September or the first of October of 1945, in the office where I was making the audit, and William Shubin was present, also Special Agent Samuel Phoebus, at which time I asked him if that was part of the—if that was money that he invested in this residence, if it was part of the money that was received from overcharges, which he had stated at that time that it was.

Q. Will you speak up a little? I have difficulty in hearing you sometimes. Did you at any time discuss with the defendant Jack Kissel in connection with your investigation of the Vernon Hotel & Restaurant Supply Company the source of funds used by him to purchase certain rugs, an 1940 Plymouth and some life insurance, the funds totalling about \$1,450?

A. Yes; those items were discussed.

Q. Approximately when, where and who was present?

A. I would place the time at sometime in September of 1945, at the office where I was making the audit, in the presence of Jack Kissel and Special Agent Phoebus.

Q. What was said by you and what was said by Mr. Kissel [321] on that occasion?

A. Well, the question was as to the source of the funds used for these purchases, and which he had advised were from overcharges.

Q. Did you at any time receive from any of the defendants or their attorneys an affidavit as to the date

(Testimony of James Bryant Eustice)

the partnership which is known as the Vernon Hotel & Resturant Supply Company was formed?

The Court: That was stipulated to by the defense at the beginning of the trial.

Mr. Strong: That is correct.

The Court: Is there any difference?

Mr. Strong: I think there may be. As I remember, they said the 14th day of November, 1942.

Mr. McLaughlin: Mr. Strong, if you had a different date, I would have been very happy to have accommodated you promptly. I took that date out of your indictment, I think. Well, it says the first of November, 1942, in the indictment.

Mr. Strong: It says the 16th of November, 1942.

The Court: Well, there shouldn't be any dispute about that. What is the date?

Mr. Strong: It is the 16th of November, 1942.

The Court: Well, let that stand in the record. Counsel for the defense will correct it if it is not correct. They know what the date was. They were willing to stipulate as to [322] the partnership and the names and date.

Mr. McLaughlin: Yes, your Honor. I do not see the materiality.

The Court: I don't, either.

Mr. McLaughlin: Whether it is the 14th or the 16th.

The Court: I do not, either.

Mr. Strong: An overt act, your Honor. That is all.

The Court: I would like to ask a question, subject to objection of counsel on either side, so I will have the record clear, because it is going to be kind of a leading question and I want counsel to always interpose an objection to the court the same as they would to opposing counsel.

(Testimony of James Bryant Eustice)

You testified to an item of \$46,000 that was called an exchange account of overcharges. Then you gave us a number of items here that you have testified to with reference to deposits in the bank. Now, is it not true that those items were taken out of the \$46,000; they are not in addition to it?

The Witness: They are——

The Court: Just a moment. Gentlemen, any objections?

Mr. Strong: Well, no objection.

The Court: I just want to clear the record. They were taken out of that, were they not?

The Witness: They are in addition to the \$46,000.

The Court: Take a recess of 10 minutes, the morning recess. [323]

(The court admonished the jury and a short recess was taken.)

The Court: Stipulate the jury are present, gentlemen?

Mr. McLaughlin: So stipulated.

Mr. Strong: So stipulated.

The Court: Stipulate the defendants are in court?

Mr. Strong: So stipulated.

Mr. McLaughlin: So stipulated.

The Court: Proceed. Cross examine.

Mr. Strong: Has your Honor finished with the Witness?

The Court: Yes.

Mr. Strong: I forgot to ask him one question. May I ask him now? May I have this marked for identification, your Honor?

The Court: Yes.

(Testimony of James Bryant Eustice)

The Clerk: That will be Government's Exhibit No. 57 for identification.

(The document referred to was marked as Government's Exhibit No. 57, for identification.)

Q. By Mr. Strong: I show you Government's Exhibit No. 57 for identification and ask you if you ever saw this before?

A. Yes, sir.

Q. It consists of three pages?

A. Yes, sir; I have.

Q. Could you speak up, please? [324]

A. Yes; I have.

Q. Can you state about when you saw this the first time?

A. It was towards the end of the audit.

Q. And did you see this in connection with your investigation into the income and the source of income of the Vernon Hotel & Restaurant Supply Company?

A. Yes; I did.

Q. Will you state the date approximately when you saw it?

A. It must have been the first part of October.

Q. What year?

A. 1945.

Q. And where was it?

A. In the office where I was making the audit.

Q. And who was present?

A. Mr. William Shubin and Special Agent Phoebus.

Q. Will you state the circumstances under which you first saw this Government Exhibit 57 for identification?

(Testimony of James Bryant Eustice)

Mr. McLaughlin: Well, I think the question should be who was present and where was it, and not the circumstances.

Mr. Strong: He already stated who was present and where it was.

Mr. McLaughlin: In other words, when you ask the circumstances it always gives him a chance—not that I am [325] deprecating the witness, because I am not—but I mean the circumstances have nothing to do with it.

Mr. Strong: I will withdraw the question.

Q. Did anyone give you this Government Exhibit 57?

A. Yes, sir.

Q. Who gave it to you? A. William Shubin.

Q. And did you see any of the matter which is written on here being placed on this Government Exhibit 57? A. Yes; I did.

Q. And who was placing it on that exhibit?

A. William Shubin.

Q. Will you state what William Shubin said to you, if anything, when he gave you this Government Exhibit 57 for identification?

A. Well, he gave it to me in answer to a request I had made him for this list.

Q. What had you asked him for?

A. Well, I had asked him for a list of the invoices that he had made out that didn't actually represent the sale of merchandise by which he brought the money received from overcharges onto the books of the partnership.

(Testimony of James Bryant Eustice)

Q. And did he give you this list which is Government Exhibit 57 for identification in that connection?

A. Yes, sir. [326]

Q. And did he say anything to you when he gave it to you?

A. I don't recall any conversation at the time that he gave it to me, except that that was the list that I had requested.

Q. How did you know that was the list you had requested?

A. Well, I had seen him preparing the first part of this list.

Mr. Strong: I offer this document into evidence, your Honor.

The Court: In evidence.

Mr. McLaughlin: To which we object on the ground that it is immaterial and not responsive to any issues in the indictment, and there is no proper foundation; and furthermore, it is a personal document made by one of the defendants in this case in connection with his tax matters.

The Court: Let the record show the objection was made prior to the ruling of the court.

Mr. Strong: May I show it to the jury, your Honor?

The Court: Yes; you may.

The Clerk: Government's Exhibit 57.

(The document heretofore marked as Government's Exhibit No. 57, was received into evidence.)



## SALES RECORD - SINGLE PAGE FORM

DESCRIPTION		INVOICE NO	MISCELLANEOUS	
			ACCT	AMOUNT
AMOUNTS FORWARDED				
37087	100 00			
37144	60 50			
37185	66 00			
38036	30 60			
38408	132 00			
38417	242 00	11-22-43		
38422	193 60	11-23-43		
38538	99 60	11-24-43		
39095	876 0	12-28-43		
39696	1,011 40			
39740	27 00	2-2-44		
39747	250 00	2-2-44		
39750	18 00	2-3-44		
39789	48 24	1-9-44		
39844	81 25	2-17-44		
39845	60 00	2-17-44		
39846	20 00	2-17-44		
39849	27 50	2-18-44		
39956	450 00	3-3-44		
39963	50 60	3-3-44		
40001	476 6	3-9-44		
40048	209 00	3-15-44		
40086	175 05	3-21-44		
40126	23 00	3-24-44		
40141	123 00	3-28-44		
40142	100 20	3-28-44		
40172	750 00	3-31-44		
40173	300 00	3-31-44		
40175	303 00	3-31-44		
40201	101 45	4-4-44		
40211	105 00	4-5-44		
40218	182 40	4-5-44		
40225	178 50	4-7-44		
40243	431 25	4-7-44		
40244	122 10	4-7-44		
40245	73 21	4-7-44		
40300	554 00	4-17-44		
40390	36 00	4-24-44		

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4-17-44

4-24-44



SALES RECORD SINGLE PAGE FORM

DESCRIPTION	INVOICE NO.	MISCELLANEOUS	
		ACCT.	AMOUNT

ITS FORWARDED

40422	699.00	4-24-44
40472	2050	4-28-44
40477	36550	4-28-44
40511	10500	5-3-44
40561	9000	5-7-44
40576	165509	5-8-44
40582	1310.01	5-12-44
40711	42884	5-19-44
40857	53200	5-26-44
40860	10000	5-26-44
40876	46370	5-29-44
40935	87550	6-1-44
41134	10000	6-13-44
41194	26000	6-19-44
41266	40900	6-23-44
41267	81600	6-23-44
41339	56694	6-28-44
41363	73073	6-29-44
41379	29600	6-29-44
41381	37900	6-29-44
41384	45000	6-29-44
41410	6800	6-30-44
41445	15000	7-5-44
41451	55000	7-5-44
41458	27220	7-5-44
41468	75075	7-6-44
41473	83410	7-3-44
41734	39000	7-19-44
41946	90000	7-31-44
42012	16530	8-3-44
42467	6000	8-24-44
42512	10710	8-25-44
42802	119288	9-8-44
42826	22000	9-8-44
42836	19440	9-6-44
42915	54857	9-13-44
43003	4101	9-18-44
43085	9900	9-19-44
43151	38520	9-22-44
43164	31190	9-22-44
43220	4140	9-26-44





(Government's Exhibit No. 57)  
**RECORD OF SALES**

INTED IN U. S. A.

UNIVERSAL FORM 66-54

**MISCELLANEOUS**

ACCT.

AMOUNT

✓ ACCOUNTS  
 RECEIVABLE

✓ CASH SALES

46193	4318	1-9-45
45884	5420	12-20-44
45883	5570	12-30-44
48528	7590	3-30-45
48504	15993	3/28-45
48374	53896	3/25-45
48299	50809	3/21-45
47874	26535	2/5/45
47870	33375	3/5/45
47525	41011	2/21/45
47395	147800	2/15/45
47354	94400	2/14/45
47303	69917	2/14/45
47131	100461	2/6/45

TOTAL \$ 657095





(Testimony of James Bryant Eustice)

Mr. Strong: No further questions. [327]

Cross Examination

By Mr. McLaughlin:

Q. Mr. Eustice, when you were given that Exhibit No. 52 you did not tell Mr. Shubin that it might be used in any criminal proceedings against him?

A. No, sir, I did not.

Q. You never told him whether it would or would not be so used? A. No, sir.

Mr. McLaughlin: That is all.

The Court: That is all.

(Witness excused.)

Mr. Strong: I will call Mr. Bircher.

DONALD OLIVER BIRCHER

called as a witness on behalf of the government, having been previously duly sworn, was examined and testified as follows:

Direct Examination (Cont'd.)

The Court: You have been sworn?

The Witness: Yes, your Honor.

The Court: State again your name for the record.

The Witness: Donald Oliver Bircher.

By Mr. Strong:

Q. Now, Mr. Bircher, you are I understand a special agent of the Bureau of Internal Revenue?

A. That is correct. [328]

Q. And did you during 1945 have occasion to investigate the income tax returns of the Vernon Hotel and Restaurant Supply Company? A. Yes.



(Testimony of Donald Oliver Bircher)

Q. And in connection with that investigation did you have occasion to investigate the income and source of income of the Vernon Hotel and Restaurant Supply Company? A. Yes.

Q. Did you at any time in connection with that investigation have a conference in your office with the defendants or any of the defendants? A. Yes.

Q. Will you state when the first of such conferences, if there was more than one, was held?

A. July 24, 1945. I interviewed William Shubin and Frederick Shubin in our office. William Shubin was in in the morning, I believe, and Frederick Shubin afterwards.

Q. And will you state who was present?

A. Each of them was accompanied by their attorneys, Stanley Anderson and Joseph D. Brady. Also present were Special Agent Phoebus, Special Agent Walter Schlick and Miss Caloway, our office stenographer, took one statement and Miss Ouida Dudney took another. I was present also.

Q. Now, did you at the conference state to the defendant William Shubin that any of the matters on which he gave [329] you information might be used against him? A. Yes.

Q. Did you indicate that that might be used against him in any kind of a proceeding? A. Yes.

Q. Will you tell us what you said.

A. I stated as follows. "I will advise you that any statements you make or any documents or evidence produced at this hearing can be used in any subsequent proceeding by the government."

(Testimony of Donald Oliver Bircher)

I also advised them that they were not required to incriminate themselves and that they had the right to refuse to answer any question if they felt that the answers might tend to incriminate them, and I also asked them if they wished their attorneys to amplify that advice, go into it any further with them, and their attorneys did give them further advice.

Q. Do you remember what they said?

A. Their attorneys urged——

Mr. McLaughlin: Objected to on the ground it is privilege.

Mr. Strong: May I be heard, your Honor?

Mr. McLaughlin: Your Honor, I will withdraw my objection to that question.

The Court: All right.

The Witness: Their attorney, Mr. Brady, advised William [330] Shubin at the first conference that while he had the right to decline to answer any questions even if he felt that to do so might tend to incriminate him, yet he advised him to proceed and answer fully any questions that were asked.

Q. By Mr. Strong: Had the Bureau of Internal Revenue issued any subpoenas calling for the presence of William Shubin at this conference? A. No.

Q. Has the Bureau of Internal Revenue at any time issued any subpoenas calling for the presence of William Shubin at any conference? A. No.

Q. Has the Bureau of Internal Revenue issued any subpoenas of any kind for any purpose directed to William Shubin? A. No.

Q. Did the defendant William Shubin so far as you know appear voluntarily at this conference?

(Testimony of Donald Oliver Bircher)

Mr. McLaughlin: Objected to as a conclusion.

The Court: Yes, it is a conclusion. State the facts.

Q. By Mr. Strong: Did Mr. Shubin at any time during this conference indicate that he was not willing to give any information that was sought by the Bureau of Internal Revenue?

Mr. McLaughlin: Objected to as leading and suggestive.

The Court: No, because if he said he would not, it would be admissible. Overruled. [331]

Q. By Mr. Strong: Go ahead.

A. Mr. Shubin stated that he appeared voluntarily and would willingly and truthfully answer all questions.

Q. Did you at that conference ask Mr. William Shubin questions and did he give answers respecting the income and the source of income of the Vernon Hotel and Restaurant Supply Company? A. Yes.

Q. Were you investigating any particular years as to the income of that concern?

A. Yes. I told them that we were investigating the years 1942, 1943 and 1944.

Q. And was there any overall sum for the three years that you were discussing with the defendant William Shubin at this conference?

Mr. McLaughlin: Now, your Honor, I wish to object to that question and before your Honor rules, may I take the witness on voir dire?

The Court: Yes.

Q. By Mr. McLaughlin: Mr. Bircher, on the occasion of your discussion that you have been describing, you had a court reporter there who took down all questions and answers of the parties, did you not?

(Testimony of Donald Oliver Bircher)

A. Yes, at one of those conferences there was some discussion off the record but where that occurred it shows on the [332] transcribed record, and that was in connection with the advice of their attorneys regarding their admonition. That is the only conversation that occurred off the record.

Q. Now you had asked these three parties to come up there and give a statement before they came?

A. No. I had asked their attorneys. I told their attorneys that we were going to investigate the income tax liability of the Vernon Hotel & Restaurant Supply Company in connection with the amended returns which had been filed a few days prior and that I desired to talk to them if they wanted to come in and give a voluntary sworn statement.

Q. Well, did you tell their attorneys that you were investigating the income tax returns filed by the individuals?

A. I cannot recall definitely. The individuals and the partners had all filed amended returns and I told their attorneys that I would like to have them come in and discuss the matters.

Q. Yes, and when they came in either then or prior to that time you told them that a court reporter would take down the questions and answers? A. Yes.

Q. And then you told them that after they were taken down they would sign those or have the opportunity of signing them and you would retain the signed copies in your files? A. Yes. [333]

Q. And you did do that thing?

A. That is correct.

(Testimony of Donald Oliver Bircher)

Mr. McLaughlin: Mr. Strong, will you stipulate that the three exhibits for identification—what are the numbers?

Mr. Strong: 50, 51 and 52.

Mr. McLaughlin:—50, 51 and 52 are the three statements you offered in evidence yesterday from the files of the Internal Revenue Department?

Mr. Strong: Yes. I will so stipulate.

Mr. McLaughlin: Well, at this time, your Honor, I object to any further questioning on that transaction on the ground that it is an indirect attempt to put into evidence statements made by these parties which are taken down in writing and which are in substance embodied as supplemental returns.

Now, in these cases we were discussing yesterday these very things I mentioned. It characterizes them as in the nature of supplemental returns and to permit a witness to testify to a discussion and conversation which was nothing more than a running question and answer affair which was put down on paper and signed is, I submit, in controversion of the regulation and the Act that we were arguing yesterday.

The Court: No, I don't believe so, counsel. I think that that Act pertains to returns or supplemental returns that are filed in which there is no preliminary such as we have here now. The court looks upon it as a complete waiver. [334] The defendants appeared and offered to make these statements and were told that they might be used subsequently. No objection was made and I believe that comes under the statutory provisions that we discussed yesterday.

(Testimony of Donald Oliver Bircher)

I will overrule it and allow an exception to the defendants .

Mr. Strong: May I have my last question read?

The Court: Read the question, Miss Bennallack.

(Question read as follows:

“Q. And was there any overall sum for the three years that you were discussing with the defendant William Shubin at this conference?”)

The Witness: Yes.

Q. By Mr. Strong: What was that sum?

A. Approximately 141,000 overcharges that were received during that period, November 16, 1942, to December 31, 1944.

Q. Did you ask the defendant William Shubin what the source of these funds of the Vernon Hotel & Restaurant Supply Company were? A. Yes.

Mr. McLaughlin: Now, your Honor, in order that I may preserve my objection to this line of testimony, may it be stipulated that I object on the ground that it is a violation of the statute and the regulation to which I referred, and [335] also that it is immaterial and it is not properly admissible evidence?

The Court: Yes. Let the record show that that objection may stand as to all his testimony. Overruled. Exception allowed. Proceed.

The Witness: May I have the question again?

The Court: Repeat the question, Miss Bennallack.

(The question was read as follows:

“Q. Did you ask the defendant William Shubin what the source of these funds of the Vernon Hotel & Restaurant Supply Company were?”)

The Witness: Yes.

(Testimony of Donald Oliver Bircher)

Q. By Mr. Strong: What did he say?

A. He said they were from overcharges and I asked him what he meant by overcharges and he said collections in excess of the OPA ceiling prices or in excess of the invoice prices.

Q. Did you ask how these overcharges were collected?

A. Yes.

Mr. McLaughlin: If your Honor please, I object on the ground that that is leading and suggestive in addition to the other objection.

The Court: Overruled.

Q. By Mr. Strong: What did he say?

A. William Shubin said that he usually collected the [336] overcharges himself in cash at the time each transaction occurred: that occasionally his two partners, Frederick Shubin and Jack Kissel, collected overcharges and handed them to him.

Q. Did you ask defendant William Shubin whether these overcharges were recorded on the invoice of the Vernon Hotel & Restaurant Supply Company?

A. Yes.

Q. What was his answer?

A. He said the overcharges were not recorded on the invoices. The invoices usually stated just the ceiling prices of the meat.

Q. Did you ask defendant William Shubin what the procedure was for collecting the charges shown on the invoices and that shown for collecting the overcharges?

A. Yes.

Mr. McLaughlin: In addition to the objection, I again object on the ground that it is leading and suggestive.



(Testimony of Donald Oliver Bircher)

The Court: Well, counsel, I think you should frame your questions so as to avoid any suggestion of what the answer might be. Read the question again.

(Question read.)

The Court: You see, you suggest to the witness very definitely. It may be that the question wasn't answered or asked at all. I think the better method of asking a question is "What did you say, if anything, about the method of [337] collecting these overcharges?" instead of making it so definite.

Mr. Strong: I will withdraw the question.

Q. What, if anything, did William Shubin say as to the method of collecting the overcharges billed on the invoices?

A. He said that the charges billed on the invoices were usually paid by check, not always, but usually paid by check to the cashier.

Q. What, if anything, did the defendant William Shubin say as to the method for collecting the overcharges?

A. He said that those were usually collected in cash at the time that the sales were made in addition to the invoice prices for the goods sold, and that the cash was usually collected in secret, that is, in a place in the cooler or outside of the vision of most of the employees around the office.

Q. What, if anything, did William Shubin say as to the amounts of the overcharges?

Mr. McLaughlin: If your Honor please, I submit he might just as well ask him the same way. He is just leading the witness and after all, this witness was there. He can tell what was said.

(Testimony of Donald Oliver Bircher)

The Court: Yes, just tell the conversation. That is the best way. Counsel is correct. Give the conversation [338] between yourself and the Shubins with respect to these matters.

The Witness: I asked Mr. Shubin to describe what he meant by overcharges that he had collected and that he said his partners had connected, and he said that the overcharges were amounts in excess of the OPA ceiling prices and in excess of the amounts listed on the invoices when the goods were sold. [339]

I asked him whether he showed preference or whether he overcharged all of his customers the same amount during the same periods and he said that he didn't overcharge them all the same amounts, that he was looking to postwar business and that he showed some preference in making overcharges, and he said he usually kept those overcharges in a record for a few days or a current record of them on a slip of paper; he usually collected them at the moment he made the sale but sometimes that they would come in a day or two later and pay the overcharges and then he would scratch their names off the list and then when he had all their names scratched off the list he had before him for overcharges, he would then throw the list away.

He said he kept the cash in a drawer in the office or in his pocket for a few days at a time and then took it home and hid it, and that he kept it all together until he needed it. He said finally at different times when he and different partners would want money he would give it to his partners and occasionally made an accounting to them. He said they would ask him how they stood and he would tell them that he would give them an accounting as to how

(Testimony of Donald Oliver Bircher)

these overcharges amounted as soon as he could count it and that he sometimes did that.

He said he usually collected the overcharges himself but on other occasions both of his partners would collect them and [340] turn the sums over to him, that they all trusted him and that he kept the funds together and finally when they got ready to file these amended returns that they had used up some of the cash funds but they still had something in the neighborhood of \$70,000 left in cash and that they could get it and used it when they filed their amended returns for the amended returns of the Vernon Hotel and Restaurant Supply Company.

Q. Did you ask him anything about whether the Vernon Hotel and Restaurant Supply Company had to pay overcharges on meat it purchased?

Mr. McLaughlin: Objected to as leading and suggestive.

The Court: Yes, I think it is. Ask him if there was any other conversation.

Mr. Strong: Well, may I submit to your Honor that the conversations here took quite a long period of time and it would be very difficult for the witness to remember everything, and unless I can point to something specific——

The Court: There is no objection to your mentioning an item but not just as definitely as you do, counsel.

Q. By Mr. Strong: Was there anything said about the Vernon Hotel and Restaurant Supply Company's purchases of meat?

A. I don't recall that I asked William Shubin whether they overpaid when they purchased meat, but I did ask the other partners for that information. [341]

(Testimony of Donald Oliver Bircher)

Q. That was at another conference? A. Yes.

Q. I just want this one conference discussion now. Was anything said about how the overcharges were computed?

A. I asked him how he determined and who determined how much overcharges should be collected from each of his customers and he said he usually determined those himself as to how much to overcharge at any particular time or any particular period. He said that he didn't overcharge on back fat but he did on beef and he said that he only overcharged—what in substance he said was that he only overcharged what he thought was reasonable at any particular time because when he was getting a larger price for lard then he didn't have to overcharge so much in order to keep things running smoothly.

He said that the customers usually did not have to be prompted about making their payments of the overcharges, that he had them trained and that if they wanted to get meat they knew they had to come forward, that he did not have to prompt them about it.

Q. Was anything said about making entries of these overcharges on records of the Vernon Hotel and Restaurant Supply Company?

A. William Shubin said that he did not enter overcharges as a rule because he did not want the OPA to find such [342] a record that they were overcharging.

He said, however, that they did enter some of the overcharges by preparing fictitious invoices and plugging in some of this money that was represented by overcharges. Occasionally they would need money in the business and they would plug in some of the money by creating fictitious

(Testimony of Donald Oliver Bircher)

invoices covering some products that did not require red points such as pigs feet and so forth.

Q. Was there anything said about the distribution of these overcharge receipts?

A. William Shubin said that he and his two partners shared equally in the profits of the business and in the profits from the overcharges. He said he didn't distribute the funds but that each of the partners were permitted to withdraw or get funds or advances from this fund. [343]

Q. Was anything said about the knowledge of the other two partners as to these overcharges?

A. Yes. He said——

Mr. McLaughlin: Objected to on the grounds that it would be hearsay as to the other two partners, anyway. They were not there.

The Court: When did this conspiracy terminate, Mr. Strong?

Mr. Strong: At the date of the issuance of the indictment.

Mr. Neukom: March 13th, I believe, this year.

Mr. Strong: That is right.

The Court: The conspiracy was then in existence at the time of this interview?

Mr. Strong: No; I don't believe so, your Honor—oh, yes; it was, your Honor. I am not offering that as against the others, anyway, so that I will withdraw it just to save time.

The Court: All right. I will say to the attorneys, if you will return at 1:30 I will hear your legal argument.

(Whereupon, the jury were admonished and excused until 2:00 o'clock p.m., and an adjournment of the case taken until 1:30 o'clock p.m.) [344]

Los Angeles, California, Thursday, June 20, 1946,  
1:30 p.m.

The Court: Mr. Cross, will you call the case?

(Case called by the clerk.)

Mr. Strong: Ready for the Government.

Mr. McLaughlin: Defendants are ready and defendants are present.

The Court: Let the record show the jury is not in the courtroom.

Mr. Strong: So stipulated.

Mr. McLaughlin: So stipulated.

The Court: I will hear your argument.

Mr. McLaughlin: Your Honor, the motion which I propose to make to dismiss the proceedings at this time is supported by the New Rules, which provide that a motion to dismiss is part of the method to bring up any defect in connection with the indictment or the proceedings before the Grand Jury. And I direct your Honor's attention—I assume your Honor is familiar with Rule 6, sub-paragraph (e), which states that:

“Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters [345] occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that



grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."

In reliance upon that Rule, I think that I should ask Mr. Strong if he will stipulate that the returns which have been offered into evidence here, that is, the income tax exhibits 35 to 49 and the statements, the sworn statements which were filed with the Department of Internal Revenue and which are marked as for identification 50, 51, and 52, were exhibited to or read to the grand jury.

Mr. Strong: Well, your Honor, I think that that is not so; and the returns, the dates of the returns, the certified copies, show on their faces when we got them, and the indictment date is shown on the indictment, and a mere comparison of the two will disclose that that could not have been so.

Mr. McLaughlin: Mr. Strong, I had not noticed that. Let us take them one at a time now.

Mr. Strong: I may state that I have no recollection of that happening at all.

The Court: Have you any evidence that it did, Mr. McLaughlin? [346]

Mr. McLaughlin: Well, your Honor, I think that in the discussion yesterday, Mr. Strong in discussing those three statements which he sought to introduce into evidence, at the time the Grand Jury began to deliberate, he said, we did not know the names of all these parties at that time; and, he said, that is why we did not put them down. I assume that he, in writing for those things last fall, if he did, wrote for them for use in connection with the Grand Jury.

The Court: The record now shows, unless you have something different, that that is not correct.



Mr. Strong: May I say something? I do not see what the letters which we wrote have to do with this Grand Jury altogether.

The Court: Well, I want Mr. McLaughlin to make his record.

Mr. Strong: Yes.

The Court: Because the defense are entitled to that.

Mr. Strong: I have no recollection of any of these documents being used before the Grand Jury; and I can say that, as far as I remember, none of these letters were used before the Grand Jury and I do not remember of any statements being used.

The Court: All right.

Mr. McLaughlin: Mr. Strong, when you say you do not remember any statements being used before the Grand Jury, [347] do you include in that those three statements?

Mr. Strong: Those are the ones I am talking about. I am talking about those three statements.

The Court: 50, 51, and 52?

Mr. Strong: Yes.

Mr. McLaughlin: And they were not so read or exhibited?

Mr. Strong: I do not recall their being read at all at any time.

The Court: Unless the defense counsel has some evidence to the contrary, I suppose that must be accepted by the court.

Mr. McLaughlin: I think that is right, your Honor.

The Court: That would be true on that point. Have you some other point, Mr. McLaughlin?

Mr. McLaughlin: Well, it is tied in with this, although a distinctly different point. I am going to make it now, as long as we have some time.

The motion which I was going to make was that evidence which had been illegally obtained was used before the Grand Jury. Mr. Strong states to the court it was not; so, on his statement, we accept that.

The other motion that I was going to make was that there was not sufficient evidence offered before the Grand Jury to show the commission of a crime.

Now, there again, I will be very frank with the court, and I was going to premise that motion on the same contention [348] and I realize that your Honor has discretion in inquiring into whether there was sufficient evidence or not; and I think that any objection I might advance, in view of the fact that letters were written last fall when this investigation was under way, and that at least the United States Attorney had them in his possession, that I should request permission to have the transcript examined and the minutes examined to see whether there was evidence of a crime as shown in the indictment.

Mr. Strong: May I just say one thing, your Honor? I want to state categorically to your Honor and the counsel for the defendants that I at no time had possession of any of these written statements or documents prior to the people being authorized to hand them down by the Internal Revenue Commissioner.

The evidence which was before the Grand Jury was amply sufficient to warrant the Grand Jurors indicting these people, and it had nothing to do with these statements, as I recall.

And this motion is not timely, your Honor, under 18 U.S.C. 556 (a). This motion has to be made within ten days after the parties are presented for arraignment. It is now way beyond ten days after that date, and I know of no difference as to that.

As to disclosing what happened before the Grand Jury [349] simply upon counsel's statement that he might feel that this letter I wrote, asking authority to use these statements, that they might not be sufficient in evidence, I submit that is no basis for disclosing the proceedings.

Mr. McLaughlin: Your Honor, these letters are dated October 10, 1945, and the indictment reflects that it was brought by the Grand Jury in January of 1946; and the letters here reflect that these documents were being obtained by the United States Attorney—I had better not be too inaccurate about it; I will get Mr. Strong's own letter. [350]

I might say further, your Honor, that the evidence produced in this proceeding amply demonstrates the fact that the grand jury had a basis for issuing the indictment. I think if even only a small portion of the evidence introduced here had been shown to them that it would have been a full basis for the issuance of the indictment without more.

Mr. McLaughlin: Well, I can't cover that first. Now, this letter which is part of Exhibit 55, and it is the letter signed by Charles H. Carr—I assume Mr. Strong wrote it—reads as follows:

“In the above-entitled matters the defendants are to be charged with conspiracy to violate, and with various violations of the Emergency Price Control Act.

“We are now in the process of conducting a grand jury investigation into the activities of these companies and individuals. Agents of the Bureau of Internal Revenue, in connection with income tax returns of the named individuals and concerns, appear to have been furnished certain information which will be very pertinent to the trial of the case arising from the instant investigations.

“Will you please secure the authority of the Commissioner of Internal Revenue for Special Agents D. O. Bircher and Samuel Phoebus, and Internal [351] Revenue Agent J. Bryant Eustice to testify on the trial of the above-entitled case, and to furnish such information and documents as are in their possession, pertinent to said case?”

Now, the intention apparently was to use those things and quite obviously, and there again I have to guess because I wasn't there, but quite obviously he is there asking to use Internal Revenue Agent J. Bryant Eustice and D. O. Bircher and that those men in testifying would have used those statements to refresh their recollection, and the whole thing comes down to the point that I want to argue in this case that even if they weren't actually introduced before the grand jury they were obtained by the United States Attorney and the United States Attorney procured them from the Internal Revenue Department to come into court and testify to matters which were also set forth in those things if they did not exhibit them to the grand jury and I submit that the material contained in those is confidential and that the United States Attorney unlawfully obtained it for purposes in connection not only with the grand jury but also in connection with the investigation.

The code section which is involved in this case makes a specific provision against the use of income tax returns for any purpose except as authorized by regulations. Now, there must have been reason for adopting that code section and the only policy reason that I can see for adopting such a regula- [352] tion was to afford some protection to taxpayers who are required in their returns to set forth the facts as to where they got their income

and so forth. The government is interested in collecting taxes and it wants to afford a certain amount of confidence or privacy to persons who are truthful enough to submit their returns honestly and who may have obtained income in some manner that may or may not violate the law.

The government collects that money as income and it rightly should and in order to encourage people to make accurate returns and not be jeopardized by criminal prosecution, I think that statute was enacted for that purpose.

Now, the regulation goes along and it does not say that the Commissioner shall in all instances furnish it to the government. It states some conditions there and as your Honor observed yesterday it shows that there is some discretion which must be exercised. Otherwise there would be no purpose for any regulation. The statute might just as well have read and said and the regulation too that whenever anybody in the government wants a copy they shall have it, but it did not say that and I submit therefore that this is a very important statute and if it is to be just slid over and disregarded in all these matters that it is being nullified, and I submit that when the United States Attorney obtains one of those returns in violation of the statute or not in com- [353] pliance with the statute and rules and regulations and uses it in connection with getting information for an indictment and perhaps for use, according to this letter he certainly intended to use the two agents out here whom he mentioned and any documents that they have in their charge, and I submit that they have violated the laws of this country with respect to search and seizure and that the indictment for that reason should be quashed.

Now, this is not a new question.

The Court: Oh, no. I am familiar with it.

Mr. McLaughlin: Yes; and also Mr. Strong stated that we waived at the time. In these situations when you don't know a fact, when you first discover it and you bring it to the court's attention, why, that is sufficient.

There is one case that I would like to mention and I know your Honor is familiar with it, *United States v. Potts*, reported in 141 Fed. (2d) page 45. That was before the new rules. It states that a motion to quash is a proper method to attack any proceeding which was defective before the grand jury. Now, I want to refer your Honor to the cases which I think are directly in point and which show that there has been diversity in this case that transcends the complaint in this case at bar, assuming that these parties are as guilty as the government contends that they are. I submit that the rule of privacy that the attorneys for the government have [354] violated in this case and is more important and it is more important to preserve those rules than it is to seize upon a particular instance and disregard it.

Now, in the case of *United States v. Smith*, that is District of Missouri and was decided in 1938. It is reported in 23 Fed. Supplement 528. In that case two police officers who were police officers of the police department of St. Louis worked with FBI agents also in connection with making arrests, and the testimony showed that the two police officers had entered the residence of the defendant without any warrant or search warrant and had placed the defendant under arrest and then made the defendant reach into her clothes and take out a package containing narcotics and deliver the same to the officers.

Now the accused made a motion to suppress the evidence and quash the indictment and the court held that



the indictment should be quashed and said, at page 529, and I desire just to read this because I think that the language as to the policy behind these rules that protect defendants against certain things that they should be protected against is worthy of preservation. At page 529 the court said:

“It is clear that if this seizure had been made by the federal narcotic agents that it would have been in violation of the Fourth Amendment, and the motion to suppress would have to be sustained. [355] It is true that the Fourth Amendment is not directed to individual misconduct of state officers.” Then they cite the *Boyd* case and others. Continuing:

“But here we have a case where these police officers are assigned and work regularly with the federal narcotic agents; where they testify that they accompany them on raids, where they have search warrants; and where they testified that any cases they make they turn over to the federal authorities. Ordinarily the use of this evidence would not be prohibited, because of the fact that it had been secured in an unlawful manner by state officers; but we have here a case where the state officers are regularly detailed to work with and cooperate with the federal narcotic agents, and when they made cases they turned them over to the federal authorities.

“If, under the state of circumstances, the evidence is not suppressed citizens would be afforded small protection from unlawful search and seizure under the Fourth Amendment to the Constitution of the United States. As was aptly said by Mr. Justice Bradley in *Boyd v. United States*: ‘Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent [356] approaches and slight deviations from legal modes of pro-



cedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any self-encroachments thereon.'

"In *United States v. Falloco*, D. C. 277 F. 75, a case involving a very similar state of facts, Judge Van Valkenburgh, said at page 82:

" 'I do not think it necessary to show that the officers of the government had special knowledge, or issued special directives, in each specific case. If we were to ignore this circuitous, uninterrupted, but substantial evasion of the Fourth Amendment to the Constitution of the United States, even though that evasion was unconscious and unstudied, we should countenance a departure from the spirit of our fundamental law more harmful in its far-reaching effects than the evil here sought to be remedied. Nothing herein said is to be construed as a surrender of [357] the right of the government to avail itself, without stint, of evidence incidentally secured by state officers under the rules, principles and conditions announced by the Supreme Court and other courts of the United States. I simply hold that, under the situation here presented by the record, the police officers in the cases at bar were so far recognized agencies of the government in the enforcement of the \* \* \* law that their acts must be governed by the limitations imposed by the federal Constitution.'

"The language used by Judge Van Valkenburgh above could well be applied to the instant case.

"The motion of defendant to suppress the evidence and quash the indictment sustained."

Another case where evidence was illegally obtained by an unlawful search and seizure and which gave rise to a quashing of the indictment is the case of *United States v. Bush* and that is a district court, Western Division of New York, 1920, cited in 269 Fed. at page 455, and in that connection the defendant was indicted for criminally receiving stolen property in violation of the so-called Carlin Act passed by Congress, and the officers had arrested the defendant and seized certain underwear. It was alleged that underwear and other things were stolen and when they arrested the [358] defendants they seized this stolen property.

Now, in holding that this indictment should be dismissed, the court said at page 457:

"The government next contends that the arrest was made by a city police officer, a stranger to the proceedings, and therefore this court should not inquire into the manner in which the evidence was obtained." Citing some cases.

"The facts, however, are not widely different from the *Flagg* case, where the evidence was brought to the federal building by a policeman who acted, the court held, as agent of the government. It makes no difference that a city police officer actually made the arrest in the belief that a felony had been committed. Certainly the clues and leads and information necessary to find the indictment were procured by government officials. In *People v. Kinney*, 185 N. Y. Supp. 645, recently decided by Judge Brown, of the Supreme Court of the State of New York, it was shown that a policeman having a search warrant authorizing a search of the home of the defendant for opium in conducting the search found a concealed loaded revolver, seized it, and later an indictment was found against the defendant for having in his possession a re-

volver without a permit. [359] The indictment on motion was dismissed. So here the officers possessed no proper search warrant for searching the home of the accused and seizing any stolen property, and therefore their discovery or information unlawfully acquired could not be used as a basis for an indictment for criminally receiving stolen property."

I have one more case, your Honor, and that is the case of *United States v. Yuck Kee*, and that is a district of Minnesota, Fourth Division, 1922, reported in 281 Fed. at page 228, and there again a motion was made to quash the indictment because evidence was unlawfully obtained. It was contended that the warrant had been unlawfully obtained in that there was no sufficient evidence filed as the basis for the search warrant actually issued and that the search warrant was not read to the defendant at the time of the search and seizure and that no copies of the search warrant were served upon them.

There are several other reasons. The main thing was that it was held to be improperly issued and the court held that under those circumstances the evidence obtained by that method could not be used and that the indictment should be quashed.

Now, your Honor is familiar I am sure with the *Boyd* case because the *Zap* case was before your Honor not long ago. [360] That case involved a question of whether a waiver had been permitted. The *Boyd* case is a leading case and it lays down rules which are certainly wholesome and I think should be abided by.

Now, the result of what has happened in this case regardless of whether these returns and whether these statements were shown to the grand jury or not is that the United States Attorney obtained without lawful au-

thority and without complying with the regulations which were adopted pursuant to law, obtained evidence and information which is the basis from which it has been his springboard in this whole case and I submit that the defendants have certainly been deprived of their constitutional rights.

I want to say this, that there is one case that even hints and it does not clearly hold that a defendant has the right to object to a personal individual income tax return being used even in spite of those regulations.

Now, that point is slightly different because I am standing upon the fact that they did not comply with the regulations and the law, but the case I have in mind is the case of *Lewy v. United States*, Seventh Circuit, 1928, reported in 29 Fed. (2d) at page 462. Now, in that instance the defendant was convicted of using the mails to defraud and Lewy Bros. was the corporation, and the court permitted the returns, the income tax returns of the corporation, to be [361] offered and received in evidence in the criminal trial against the defendant, and the court in saying that there was no error by doing that said—I do not have the quotation but I have the note that the returns were personal of the Lewy Brothers and not of the defendant, and the reason for the notation is not entirely clear unless the court was implying that the defendant's personal returns could not be used against him. I will state this, the language is quite puzzling in that case but in stating that the returns were properly used it noted that they were returns of the corporation, and I submit I don't think that the question as to whether returns regardless of compliance with the regulation has ever been passed upon insofar as the constitutionality of that statute is concerned, but I submit that if we do say

that under any circumstances they can be used, we are running squarely up against the amendment to the constitution which protects a person against such thing as that because the law requires you to make a return and where you have to do something and have to do it honestly and correctly the law and the amendments to the constitution should protect you.

Now, I add that as just a further and additional observation on this whole business. I think it is sufficient in this case to rely upon the fact that they did not comply, that they reached out and got everything they wanted unlawfully, and in connection with the motion to dismiss I also [362] want to make a motion to strike all of the evidence which relates to these returns, well, all of the evidence in the case because the case was built from the information that was obtained.

The Court: In view of the statement of the government the motion to quash will be denied and exception allowed the defendants. The motion to dismiss will be denied and exception allowed the defendants.

Mr. Strong: May I make just one statement, your Honor? In view of the fact that counsel for the defendants has here permitted himself to make all sorts of statements as to the illegality of our action and that we have obtained illegal information and violated the law, I simply want to state categorically for the record that there is no illegality here. There has been none shown, and the only possible basis for that is possibly simply counsel's wishful thinking. There is no evidence to that effect here whatsoever and the government has proceeded in due conformance with the statutory requirements as these letters to the Attorney-General to secure the returns and various other documents fully demonstrate.

(Testimony of Donald Oliver Bircher)

The Court: Call the jury. Can you give me some idea of how long it is going to take you, gentlemen?

Mr. Strong: I think we will finish late tonight or early tomorrow.

The Court: Then we will finish late tonight. [363]

Mr. Strong: May we have a two-minute recess before the jury is called?

The Court: Yes. We will take a recess.

(Short recess.) [364]

The Court: Proceed, gentlemen. Stipulate that the jury is present?

Mr. McLaughlin: So stipulated.

Mr. Strong: So stipulated.

The Court: And the defendants are in court?

Mr. McLaughlin: So stipulated.

Mr. Strong: So stipulated.

The Court: Proceed.

#### DONALD OLIVER BIRCHER,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

(Direct Examination (Resumed))

By Mr. Strong:

Q. Now, do you recall any further conversations that you had with the defendant William Shubin at the conference on July 24, 1945, which you were relating prior to the recess here this morning? A. Yes.

Q. Will you please state them?



(Testimony of Donald Oliver Bircher)

Mr. McLaughlin: Your Honor, before that question is asked, may I ask the witness a question on voir dire?

The Court: Yes.

Q. By Mr. McLaughlin: Mr. Bircher, how long has it been since you have read the statements that these gentlemen [365] gave to you which you describe?

A. I went over them this noon.

Q. And before you testified this morning, you had gone over them then, hadn't you?

A. Yes; I have read them occasionally.

Q. And the testimony that you have thus far given and which you are going to give to this question is the result of refreshing your recollection by reading those statements? A. Yes; I think so.

Mr. McLaughlin: Your Honor, I object to the question on the ground that he is testifying, not from personal memory, but from the contents of documents which are not admissible.

Mr. Strong: Your Honor, that is not what he said. He said that the testimony was the result of refreshing his recollection. Now that he has refreshed his recollection, that is what he is testifying to.

The Court: The record should be clear on that, because, if he is relying entirely upon some instrument or document, it is a question whether the testimony is admissible at all.

Mr. Strong: I think the record should show that the witness is not looking at any document while he is testifying.

The Court: That is true.

Mr. Strong: He may have some documents that he looked at during recess, but he does not look at them while he is testifying. [366]



(Testimony of Donald Oliver Bircher)

The Court: Any evidence that he remembers, himself, as occurring between himself, of course, is admissible, and he can refresh his memory, but not rely entirely upon a document that is not in evidence. That is true.

Mr. Strong: May I ask the witness a question?

Q. Did you refresh your recollection from the document or are you relying entirely upon the documents that you just discussed?

A. I have just refreshed my memory from reading it. I don't think that I learned anything that I didn't already have in mind before reading it.

The Court: Proceed.

Mr. McLaughlin: May I ask a few more questions?

The Court: Yes.

Q. By Mr. McLaughlin: Mr. Bircher, before you testified this morning you read those statements, didn't you?

A. I have read them partly. I don't know that I have read them completely and I don't know that I have even read them completely now, but for a long time I have had the substance of all of them in mind.

Q. How many times did you read them immediately prior to your testimony this morning, or any parts of them?

A. Oh, I would say six or seven times; in fact, I read them over once or twice before they were signed, during the time they were being reviewed by the defendants, and I have [367] read them over during the time I was writing reports pertaining to them. I have read them over a number of times.

(Testimony of Donald Oliver Bircher)

Q. Did you read any of those three statements clear through just immediately before you took the witness stand this morning, within the last two or three days?

A. I think I read over the first one, that is the one of William Shubin, but I don't think I read over either of the other ones completely through. I have merely glanced at them.

Q. Which one did you read this noon?

A. I looked them all over merely casually.

Q. What evidence were you trying to refresh your mind on that you did not know?

Mr. Strong: I don't think that is a proper question.

The Court: Well, I will permit it.

A. I didn't have any particular fact in mind. I just thought that I might refresh my recollection. We discussed many things, of course, during those interviews. It extended quite a period of time.

Q. By Mr. McLaughlin: Are you able to state what facts you can testify to today if you had not read those statements within the last few days?

Mr. Strong: I don't think that is material, your Honor.

The Court: That is a conclusion. I don't suppose any witness would know how to answer that. Continue, if you have [368] any other questions.

Mr. McLaughlin: I have no other questions, your Honor.

The Court: All right; proceed. The motion is denied.

Q. By Mr. Strong: Will you state your answer to the question? Would you like the question read?

A. No; I think I remember it. During the interview with Mr. William Shubin, that is the first one of the

(Testimony of Donald Oliver Bircher)

three partners that I interviewed, I recall I asked him how he usually figured his overcharges that he collected and whether he figured so much per pound; and he said that he usually just advised the customers by stating: "You owe me so much." He said that he had them educated.

The Court: Well, that was testified to this morning.

The Witness: Yes.

The Court: That is all repetition.

Q. By Mr. Strong: I wanted additional facts, not repetition, if you remembered any.

A. He said that he always wanted to report the full amount of the income of the partnership, including their income from the regular profits from their business as well as their overcharges, but that they didn't dare record their overcharges because they were afraid that the OPA officials would find that——

The Court: That is repetition. That was gone into this morning. [369]

Q. By Mr. Strong: Would you think for a minute to yourself over what you testified this morning, and then if you have any additional matters, testify to those.

A. He said that he had sought legal counsel regarding a method by which they could properly report the overcharges; and that he had consulted two attorneys, Mr. Henry Grossman and Mr. del Valle. He said he had consulted Mr. del Valle at about the time they started to collect the overcharges as to a proper method of recording the overcharges so they could properly pay taxes on them, on such income, and that finally Mr. del Valle urged him to report them, report the overcharges; and he stated that he had suggested to Mr. del Valle that they might be able to report them as gambling games, as poker or horse race

(Testimony of Donald Oliver Bircher)

winnings; and Mr. del Valle discouraged him from classifying them as such. And then, finally, he said that his attorneys, Mr. del Valle and Mr. Grossman, found a proper way to report them in that they had contacted other attorneys, and finally contacted the Mr. Joseph Brady who had mentioned for them to hire a certified public accountant to come in and make a thorough audit of all their records. And Mr. Shubin said that he made a full disclosure of all the income and all the omitted income to Mr. Rausch, C.P.A., and that Mr. Rausch had prepared amended returns and included in those returns for the partnership a total of \$141,125 that had been omitted in the original returns for the partnership for that period [370] November 16, 1942, to December 31, 1944.

He said he had made a full disclosure to his C.P.A. and a letter on the stationery of Mr. Rausch was submitted by him and read by me at the time, covering Mr. Rausch's statement, and Mr. Shubin verified that all the statements in Mr. Rausch's letter were true to the best of his knowledge and belief, and that the amended returns did make a full disclosure and properly apportion all the income.

That is all that I remember at this moment.

Q. Did you at any time, on that occasion or subsequent thereto, receive from the defendants a copy of the report of the auditor or accountant they had hired to go over the income of the Vernon Hotel & Restaurant Supply Company? A. Yes.

Mr. Strong: May I have this marked for identification, your Honor?

The Clerk: Government's Exhibit No. 58 for identification.

(Testimony of Donald Oliver Bircher)

(The document referred to was marked as Government's Exhibit No. 58 for identification.)

Q. By Mr. Strong: I show you Government's Exhibit 58 for identification and ask you if you ever saw this document before? A. Yes; I have.

Q. Will you state when and where and who was present? [371]

A. On August 1, 1945, at our office on the eighth floor, Mr. Jack Kissel appeared with his attorneys, Mr. Joseph Brady and Mr. Stanley Anderson, for the purpose of giving a voluntary sworn statement.

Mr. McLaughlin: Just a minute. I submit the question has been asked.

The Court: It has been answered.

Mr. McLaughlin: I mean asked and answered.

Q. By Mr. Strong: Did you at that time receive this Government Exhibit 58 from anyone?

A. Yes; Attorney Stanley Anderson handed that to me in the presence of Mr. Jack Kissel, and I put it down on the——

Q. Just a minute, now. Was anything said at that time?

A. Yes. I asked Mr. Jack Kissel and the attorneys whether this report represented the audit of C.P.A. Henry Rausch, and casually glanced through it, opened up the report.

Q. What did they say?

A. They said that it did represent the audit.

Mr. Strong: I offer this into evidence, your Honor.

Mr. McLaughlin: Just a minute. May I ask the witness a few questions?

Mr. Strong: Yes.

(Testimony of Donald Oliver Bircher)

The Court: Yes. [372]

Q. By Mr. McLaughlin: Was Mr. Kissel there?

A. Yes.

Q. And who else was there among the defendants?

A. No other defendant. Attorney Joseph Brady and Attorney Stanley Anderson for Mr. Kissel.

Q. That document was handed to you in connection with information relating to their personal returns?

A. No. The audit itself and the report says it is in connection with an audit of the Vernon Hotel & Restaurant Supply Company; and it is so captioned in that opening statement.

Q. But you were investigating—pardon me, go ahead.

A. And it is so captioned in the cover letter which is signed by Mr. Rausch, and which letter is dated July 24, 1945.

Q. Well, at that time you were investigating and had under your investigation the matters of the individual returns of William and Frederick Shubin and Jack Kissel, did you not?

A. Yes; also the tax on the income of the partnership, which had to first be determined.

Mr. McLaughlin: Now, if your Honor please, I object to that on the ground that it is another document which comes within the category of the supplement to an income tax return, and it has not been shown to have been obtained in accordance with the rules and regulations and the law relating [373] to it. And in this connection I make the further objection that it is privileged, and if there is any answer to that, certainly there has been no waiver of any privilege insofar as the two Shubins are concerned.

(Testimony of Donald Oliver Bircher)

The Court: Well, I think a voluntary presentation of a statement in the presence of the defense attorneys and advice of his attorneys to this witness—I don't see how you can call that privileged when he hands it to him. And secondly, I do not believe that this comes under the rule of the statute, the statutory rules that we discussed, because this has never been a part of the Government's records at all so far as our record shows here.

Mr. McLaughlin: He has produced it out of his files. That is only one point.

The Court: Well, but it never became a part of the files that were filed in Washington.

Mr. McLaughlin: I want to fix the record on that.

The Court: Oh, yes, certainly; make your record.

Q. By Mr. McLaughlin: Mr. Bircher, that document that you have been identifying has been in the office of the Treasury Department of Los Angeles where you maintain your office, hasn't it? A. Yes.

Q. And it has been one of the files and records of your department here? [374] A. Yes.

Mr. McLaughlin: Now, your Honor, on the question of privilege, an attorney cannot waive privilege, as I understand the law.

The Court: Even if his client is present?

Mr. McLaughlin: Well, that is what I say. Mr. Kissel was present, but not the two Shubins. They were not present when this was delivered.



(Testimony of Donald Oliver Bircher)

The Court: If there was one statement made by one conspirator, it is binding on them all if you find that there was a conspiracy.

Mr. McLaughlin: True, your Honor, if that is sufficient to constitute a waiver of privilege. When we are dealing with an admission which may constitute a conspiracy, that is one thing; but we are dealing with Section 1881 of the Code of Civil Procedure, which specifies and provides that statements between an attorney and client are privileged under the law. And I have ample authorities on that if your Honor cares to hear them. An attorney can't waive that privilege. The only person on earth who can waive it is the individual, and the only one of these individuals that was present at that time was Jack Kissel; and I submit that there is no showing here that the two Shubins ever waived their privilege.

Mr. Strong: May I say, your Honor—

The Court: No. Overruled, exception allowed. Proceed. [375]

Mr. Strong: May I show the document to the jury, your Honor?

The Court: Yes. In evidence.

The Clerk: Government's Exhibit No. 58 in evidence.

(The document referred to and heretofore marked as Government's Exhibit No. 58 was received in evidence.)

[GOVERNMENT'S EXHIBIT NO. 58]

MR. WILLIAM A. SHUBIN

Special Report

HENRY J. RAUSCH

Certified Public Accountant

Tax Counsellor

707 Insurance Exchange Building

Los Angeles

Vandike 9813

July 24, 1945

Mr. William A. Shubin,  
3301 East Vernon Avenue,  
Los Angeles 11, California.

Dear Sir:

In accordance with instructions received, I have made an investigation of the accounts of Vernon Hotel and Restaurant Supply Company and of the personal bank accounts of the three partners of that company. The purpose of the investigation was to ascertain all partnership income not previously reported on the Federal and State income tax returns for the calendar years 1942, 1943 and 1944.

My investigation did not comprise a complete audit of the accounts and records but consisted of an examination of such accounts, records and related data as I believed would disclose any income not previously reported.

(Government's Exhibit No. 58)

As a result of my investigation, I arrived at a total income of \$245,577.61 which, in my opinion, should have been reported as income for the years 1942, 1943 and 1944

The original returns filed showed income for the year 1943 of	\$41,033.76
and for the year 1944 of	63,418.85

a total of	\$104,452.61
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and unreported income of	\$141,125.00
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The present partnership, which was formed on November 16, 1942, did not file a return for the period from November 16 through December 31, 1942. The original return for 1943, however, included an amount of \$1,581.98 which is attributable to that period.

The unreported income of \$141,125.00 comprises the following items:

#### Partnership Records

##### Credits to Partners' Capital Accounts:

William A. Shubin	\$ 4,400.00
Fred A. Shubin	4,400.00
Jack L. Kissel	2,200.00

Total	\$ 11,000.00
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The above amounts were credited to the partners' capital accounts on April 30, 1944, as a transfer from an

(Government's Exhibit No. 58)

account entitled "Additions and Withdrawals from Investment."

An analysis of the latter account showed total credits of

\$40,053.62

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for the period from February 1943 through September 1943 and represent amounts deposited in the bank in excess of the accounts receivable collections and cash sales for that period as shown by the partnership books.

Charges to the account, during the period from March 1943 through April 1944, consisted of the following:

Checks issued to various payees

in payment of meat purchases \$10,166.02

Check issued to William A. Shubin 3,000.00

I am informed that this amount

has been included by W. A.

Shubin with the cash on hand,

as of the date of this exam-

ination, and shown as a sepa-

rate item later in this report.

Transferred to "Cash Account" 3,628.13

This amount was credited to the

cash account on September 30,

1943, and was used to offset a

debit balance in the account as

of that date. It appears that

that amount was taken into in-

come through prior charges to

the account.

Transferred to account entitled

"Operation of Meat Market" 12,259.47

(Government's Exhibit No. 58)

This amount was included in 1943 income and is a part of the \$41,033.76 reported in the original return for that year.

Transferred to Partner's capital accounts as shown above	11,000.00
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Total	\$40,053.62
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Exchange Account	\$ 5,300.00
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The account in the General Ledger entitled "Exchange Account" showed a credit balance, as of the date of my examination, of \$5,300.00. That amount, I am informed, was advanced by W. A. Shubin, from funds not previously reported as income. The account ran from January 1944 through March 1945. The total credits to the account during that period aggregated \$90,480.29. Of this amount, \$25,480.29 represented loans from outsiders. The loans were repaid during the above period and the account was charged with the repayments. The difference, \$65,000.00, represents an accumulation of advances, ranging from \$2,000.00 to \$10,000.00, which, with the exception of \$5,300.00 have been repaid. The "Exchange Account" was used as a revolving fund and the \$65,000.00 represents only the total of the individual advances, none of which exceeded \$10,000.00.

Partners' Withdrawals	\$ 740.00
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Withdrawals by Fred A. Shubin	\$370.00
and Jack L. Kissel	370.00

\$740.00
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(Government's Exhibit No. 58)

during November and December, 1942, were charged to salaries. Because partners' salaries are not deductible for income tax purposes, these charges are reversed.

Other general ledger accounts examined did not disclose any further unreported income.

#### Partners' Personal Bank Accounts

My examination of the partners' personal bank accounts, made with the assistance of each partner, disclosed the following additional income:

#### William A. Shubin

All of the deposits from November 22, 1944, to December 31, 1944	\$13,131.77	
Deposits in January 1945	1,122.41	
Total		\$ 14,254.18

William A. Shubin had no personal bank account prior to November 22, 1944.

#### Fred A. Shubin

##### 1944 Deposits

May 25	\$ 800.00
June 7	510.00
June 13	703.40
July 10	1,000.00
September 5	481.40
September 27	500.00
October 23	500.00

(Government's Exhibit No. 58)

December 5	2,000.00
December 13	520.00
December 14	300.00

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 \$ 7,314.80
1945 Deposit

February 7	500.00
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 Total \$ 7,814.80
Jack L. Kissel1943 Deposit

November 30	\$ 500.00
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1944 Deposits

August 31	\$1,000.00	
October 25	1,500.00	
December 20	1,000.00	
December 21	1,000.00	4,500.00

1945 Deposit

February 1	1,500.00
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 Total \$ 6,500.00

Other deposits, credited by the bank to the partners' accounts but not listed above, have been accounted for by the partners as consisting of amounts withdrawn from the partnership, personal loans, transfers between partners, etc.

All of the partners' bank accounts were with the Citizens National Trust and Savings Bank, Maywood Branch.



(Government's Exhibit No. 58)

The partners informed me that their wives had no separate bank accounts.

Partners' Cash Expenditures

Personal expenditures by the partners from cash not previously included in income consisted of the following:

William A. Shubin	\$13,750.00
Fred A. Shubin	5,065.00
Jack L. Kissel	2,783.00

Total	\$ 21,598.00
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The above items were given to me by the individual partners during the course of my examination.

<u>Cash on Hand</u>	\$ 11,500.00
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William A. Shubin informed me that, as of the date of my examination, he had cash on hand amounting to \$11,500.00, which should be included in the amount not previously reported.

Other Cash Items

A cash payment of	\$ 28,500.00
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was made on the purchase of the La Vista Apartments.

Cash advanced to California Meat Company during 1944 amounted to	\$ 35,500.00
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Total of all items	\$142,706.98
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Less: Amount attributable to 1942 income and included in the 1943 return	1,581.98
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Amount of Unreported Income	\$141,125.00
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(Government's Exhibit No. 58)

The foregoing will supplement my letter to Messrs. Brady and Nossaman, under date of June 27, 1945.

In the letter referred to above, the dates of April 25 and April 28, on page one, should be changed to read May 25 and May 28, respectively; and April 28 on page two should be changed to May 28.

Respectfully yours,

Henry J. Rausch

Case No. 18367 Cr. Gov. Exhibit. Date 6/20/46. No. 58 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

Q. By Mr. Strong: This report was furnished to you, I understand, pursuant to a prior request by you for it? A. Yes; that is correct.

Q. And when was that request made?

A. On July 24th, when the two Shubin boys went into our office and made a statement. I told them that we would check into their statements and verify their returns and representations as to their income from various sources, and we would want to make an audit of their books and records, and we would also want to check over their audit of their accountant, and that I wanted to see some record which would show the basis for the amended returns that were filed. We wanted to see how they were computed.

(Testimony of Donald Oliver Bircher)

Q. And did the defendants present at that meeting agree to have prepared for you a report by one of their accountants?

Mr. McLaughlin: Objected to as calling for a conclusion.

Q. By Mr. Strong: Will you state what they said in that connection in answer to your request? [376]

A. They said we could have anything we wanted; they would cooperate fully and let us have whatever we wanted to verify the returns that had been filed, to verify their statements.

Q. As I understand, you were interested at that time in the difference between the income originally reported by Vernon Hotel & Restaurant Supply Company for the years 1942, 1943, and 1944, and the amount reported on the amended returns? A. That is correct.

Q. And was this request that you made in connection with that difference? A. Yes.

Q. And this report was then submitted to you, Government's Exhibit 58? A. Yes.

Q. In explanation of that? A. That is right.

Q. Did you on July 24, 1945, during this conference also have occasion to question the defendant Frederick Shubin? A. Yes.

Q. And was that in the presence of the same parties that you testified to before?

A. That is correct.

Q. Was anything said to Frederick Shubin—

The Court: I believe he said that the Frederick Shubin [377] conference was in the afternoon.

Q. By Mr. Strong: Will you state the names of the persons who were present?

(Testimony of Donald Oliver Bircher)

The Court: Is that right?

The Witness: That is correct, your Honor.

The Court: And William was in the morning?

The Witness: That is correct.

The Court: If this is a different conference, you had better lay a foundation.

Mr. Strong: Q. Will you state at what time you examined the defendant Frederick Shubin on July 24, 1945? A. That was the afternoon and—

Q. And where was it?

A. In our office concerence room on this eighth floor, Internal Revenue Office in this building.

Q. Will you state who was present?

A. Attorneys Joseph D. Brady and Stanley Anderson, and Frederick Shubin and Special Agent Phoebus, I believe. Miss Dudney, one of our stenographers, and myself.

Q. Was anything said by you to Frederick Shubin concerning the use of the information obtained during that conference?

A. Yes. I told him that he was not required to give any statement or to answer any questions that he felt might tend to incriminate him, and that any statements he made or any documents produced at that meeting might be used by the [378] Government in any subsequent proceeding. I asked him if he understood that, or if he wished his attorneys present to advise him further in that regard; and there was some discussion, and then he stated he was willing to make a voluntary sworn statement and answer all questions.

(Testimony of Donald Oliver Bircher)

Q. Discussion between whom?

A. There was some discussion between Frederick Shubin and his attorneys, and after that discussion he said that he would voluntarily answer any questions.

Q. Now, will you relate what questions you asked the defendant Frederick Shubin and what answers you got during that conference in connection with the income and source of income on the income tax returns of the Vernon Hotel & Restaurant Supply Company?

Mr. McLaughlin: Before that question is answered, may I ask the witness a few questions?

The Court: Yes.

Q. By Mr. McLaughlin: Mr. Bircher, when did you last read the written statement of Frederick Shubin?

A. I glanced at it this noon, but I don't think I have read it completely for many months.

Q. When you say you glanced at it do you mean that you looked at and read the front sheet, and then passed over, or did you turn the pages and look at several pages?

A. I looked at several different pages, but I was [379] hungry and I didn't take time to read them all in detail.

Q. You did not read it entirely through?

A. That is correct.

Q. Were you conferring with Mr. Strong this noon about the contents? A. No; I have not.

Q. Before you came to court this morning did you look at the statement of Frederick Shubin?

A. Yes; I reviewed them all last night casually.

Q. Well, when you say "casually" do you mean you read them or you did not?

A. I read portions of them, maybe turning the first page and then jumping to the fifth page, just kind of to

(Testimony of Donald Oliver Bircher)

refresh my memory a little bit. I didn't read them thoroughly.

Q. That was last evening? A. That is correct.

Q. Prior to last evening, how long was it since you read them?

A. Probably four or five days or a week that I casually looked them over. I haven't looked them over thoroughly for many months.

Q. Well, ever since this proceeding has been going on you have been refreshing your recollection or looking at them from time to time, haven't you? [380]

A. Yes.

Q. To keep your memory refreshed? Now, are you able to state today what things Frederick Shubin said to you, without recalling what you have read at these times from the statements?

Mr. Strong: I object to that, your Honor.

The Court: Oh, I will permit it to be answered.

A. Yes; I can state in substance what was said without refreshing my memory. I know what was said.

Q. By Mr. McLaughlin: Could you have done that before you read it last night? A. Yes.

Q. You could? A. Yes.

The Court: Proceed, gentlemen.

Mr. McLaughlin: Before he proceeds, I want to make the objection so I won't be interrupting, to his testimony regarding the discussions with Mr. Shubin on the ground that he is testifying from documents and from conversations that were given in the course of his official duties as a Collector of Internal Revenue at the time that the defendant Frederick Shubin was performing his official duties and giving information that was confidential, and

(Testimony of Donald Oliver Bircher)

his testimony is in effect testimony as to the contents of documents which he has seen and read constantly since the time it was taken. [381]

Mr. Strong: I am going to state, your Honor, that there is nothing here and nothing that I know of in the law which makes the testimony of Frederick Shubin confidential. He gave it voluntarily to these people in support of his own claim in connection with his own income tax returns. He was trying to justify certain things he did.

The Court: Overruled and exception. Proceed.

Q. By Mr. Strong: Will you proceed to relate the questions you asked and the answers that were given to you by the defendant Frederick Shubin on this occasion with reference to the income and the source of income on the income tax returns of the Vernon Hotel & Restaurant Supply Company?

A. I asked Frederick Shubin whether it was true that his firm had received approximately \$141,125 in overcharges during the period November 16, 1942, to December 31, 1944, as indicated by the reports of their certified Public Accountant, Henry Rausch. And he said that that was true.

I asked him how those sums were collected and he said those overcharges were usually collected in cash, and that usually the regular charges, invoice charges, were paid by checks by the customers. He said that occasionally he collected those overcharges and occasionally Jack Kissel collected them, but usually William Shubin collected them; and that when he collected the overcharges or when Jack Kissel collected the overcharges, that they would turn over [382] that cash to William Shubin who maintained that cash fund at home.



(Testimony of Donald Oliver Bircher)

He said that the fact that they were collecting overcharges was not made known to their employees in their office, nor to their bookkeeper whom they had failed—their first bookkeeper whom they had failed to advise of their collection of these overcharges, because they did not want people to know they were in the black market; but that finally they made a full disclosure of those receipts and that income to Mr. Rausch, Certified Public Accountant, who had filed corrected amended returns on July 2nd, 1945.

He stated that he and his two partners were to share equally in the profits of the business as well as in the profits of the overcharges.

He stated that the employees of the company did not know they were collecting overcharges, nor did their respective wives.

He stated that the reason that they did not want those overcharges recorded on their books was because they were conscious of the fact that the OPA rules permitted some treble damage recovery based on any overcharges.

And he stated that he had consulted with Mr. del Valle, his attorney, who had advised reporting the additional overcharges on the tax returns, and that he had proposed that maybe they could be reported as gambling games or poker [383] games or horse racing games; and that Mr. del Valle did not approve of that and suggested getting outside counsel or getting some additional advice on reporting it.

He stated that at all times he had wanted to pay his income taxes, that is, that the company had wanted to report all their profits, but they didn't know how to with-

(Testimony of Donald Oliver Bircher)

out putting themselves liable to revocation of their license as wholesalers, meat wholesalers.

That is about all that I can recall.

Q. Was anything asked about the purchases of meat by the Vernon Hotel & Restaurant Supply Company?

A. Yes. I asked them if the company overpaid when they purchased meat ;and he said, "No," they wouldn't do that; all their purchases were strictly in accordance with OPA ceiling prices.

And he said that the reason that they didn't have to overpay was because many of the meat packers had to bone meat for the Government and that the packers didn't like that duty, and that therefore they were able to obtain a certain allotment from packers by doing their boning for them; for that reason they could obtain a supply of meat without overpaying.

Q. Was anything said about where the money received from overcharges was kept?

A. I asked Frederick Shubin where the money was kept [384] and he said that he didn't know. And I asked him that two or three times, and at one time he said he thought William Shubin, his brother, kept it at home.

Q. Was anything asked about how overcharges were determined upon?

Mr. McLaughlin: Objected to as leading.

The Court: That does not suggest the answer. The witness might say "No." I will permit him to answer.

A. He said that he sometimes collected overcharges. I believe he said that the most he ever remembered collecting was two cents a pound and the total overcharge collected at one time was \$100.00.

(Testimony of Donald Oliver Bircher)

Q. By Mr. Strong: Was anything said about whether the overcharges were collected by check or cash?

A. He said nearly always in cash; he didn't ever remember of getting a check.

Q. On August 1, 1945, directing your attention to that date, did you have a conference on that date with the defendant Jack L. Kissel? A. I did.

Q. Will you please state at what time the conference was held, where it was held, and who was present?

A. On August 1, 1945, Attorneys Joseph Brady and Stanley Anderson brought their client, Jack Kissel, to our office on the eighth floor in this building and in a confer- [385] ence room they held a conference with Mr. Jack L. Kissel.

The Court: What was that date?

The Witness: On August 1, 1945.

The Court: All right.

Q. By Mr. Strong: Was anything said at that time about the possible use of the statements made by the defendant Kissel in subsequent proceedings?

A. Yes. I told him that he was not required to incriminate himself, and that any statements he might make or any documents produced might be used by the Government in any subsequent proceedings. And I asked him if he wished to have his attorneys explain that to him more in detail, and he stated that he did, and then there was a discussion off the record where his attorneys advised him, and then he stated that he was willing to give a voluntary sworn statement and we proceeded to take his answers.

(Testimony of Donald Oliver Bircher)

Q. Did you hear his attorneys advise him?

A. His attorneys advised him that any statements he made might be used by the Government in any subsequent proceedings and that he was not required to incriminate himself, and that he had the right to refuse to answer any questions that he felt might tend to incriminate him.

Q. Was this the same conference at which Government's Exhibit 57 was received, that audit report?

A. Yes; on August the 1st, 1945. [386]

Q. Do you recall what questions you asked the defendant Jack L. Kissel on that occasion and what answers you received concerning the income and the source of income on the income tax returns of the Vernon Hotel & Restaurant Supply Company?

Mr. McLaughlin: Now, your Honor, before that question is asked, may I ask the witness the same questions?

The Court: Yes.

Q. By Mr. McLaughlin: Mr. Bircher, at that time there was transcribed a statement of the questions and answers, was there not?

A. That is correct.

Q. And you have that statement? A. Yes.

Q. And did you look at it this noon?

A. Yes, casually. I mean I didn't read it fully.

Q. Well, how long did you spend looking at it?

A. Probably three minutes to five minutes.

Q. Did you look at it before you came to court this morning?

A. Yes; last night.

Q. Did you read it through last night?

A. No. I haven't read it through, I don't think, in months.

Q. Well, how many months? [387]

A. Well, it is about eight months, I guess.

(Testimony of Donald Oliver Bircher)

Q. You did read it through eight months ago?

A. That is correct.

Q. And that was how long after it was given? It was given in August. How long after it was given did you read it?—Withdraw that. Was there an interval of time after you got that statement between this time that you say you read it through eight months ago?

A. That is correct.

Q. How long an interval?

A. About three months.

Q. And you read it through carefully then?

A. Yes, sir.

Q. And that was before you gave any testimony or information to anyone regarding this case?

A. I am not certain about that. We received the Commissioner's letter of authority, it was dated October 10, 1945, and I don't remember whether—I know that I didn't have any conference with Mr. Strong before that date.

Q. And it was about that time that you did read it through carefully, and you also read through the other two statements that we have referred to, that is Mr. Shubin, the two Mr. Shubins?

A. Yes; about a month after that date, for the purpose of writing my report in the income tax case. [388]

Q. A month after when?

A. Well, probably in November, 1945.

Q. You read it then? A. That is correct.

Q. And you had read it before in October?

A. No. I was not interested in it in October.

Q. Then, it was after this time that you made your report of the income tax. Did you also read it after you

(Testimony of Donald Oliver Bircher)

received the letter from the Commissioner of Internal Revenue?      A. Yes; that is right.

Q. The reason that you read it, the reason that you looked at the statement on this occasion and the reason that you looked it over last night was to refresh your recollection, wasn't it?      A. Yes.

Mr. McLaughlin: That is all the questions I have. And, if your Honor please, I wish to object, stating the same grounds as stated, as the basis of the objection to the testimony regarding the other two discussions, that is, with the two Mr. Shubins; and I wish to have it stipulated that my objection goes to all these questions and answers so that I won't have to object every time.

The Court: It will be so understood. Overruled. Proceed.

Q. By Mr. Strong. I just want to ask you one question [389] about these statements. When did you first read these statements, the first time?

A. Probably the day after they were transcribed.

Q. And that was how soon after the conference in each case?      A. Within two or three days.

Q. And at that time did you read the entire statements?      A. Yes.

Q. And at that time did you have a clear recollection of the questions that you had asked and the answers that you had gotten?      A. Yes.

Q. Was there anything in these statements that you found to be at variance with the questions and answers as you recalled them at that time?

A. No, except that in connection with one of the statements there were some changes made.

(Testimony of Donald Oliver Bircher)

Q. By whom?

A. In connection with the statement taken from Frederick Shubin.

Q. Who made the changes?

A. He did, he and his attorneys, when they came together to sign the statement they wanted certain portions deleted, and I told them that they could delete what they wanted to and give us what they wanted to; it was their option to furnish us what they wanted to, and if they wanted [390] to give us a sworn, signed statement, voluntary statement, they could do so and present to us whatever representations they cared to. [391]

Q. Now, will you state what questions you asked and disclose, as nearly as you can recall, what was said to you in answer by the defendant Jack L. Kissel at this conference which you have described on August 1, 1945, with reference to the income and the source of the income on the income tax returns of the Vernon Hotel and Restaurant Supply Company?

A. I asked Mr. Kissel the source of the \$141,000 that had been added to the income tax returns of the Vernon Hotel and Restaurant Supply Company, that is, that sum in addition to the amounts of the income originally reported by that partnership for that period November 16, 1942, to December 31, 1944.

He said that that sum represented black market profits or overcharges collected, sums collected in excess of OPA ceiling prices by himself and his two partners.

He stated that they had had a certified public accountant, Mr. Rausch, make an audit of their records and that all information had been given to this accountant regarding the personal investments and expenditures for his



(Testimony of Donald Oliver Bircher)

information in preparing his audit; and that that sum represented those excess charges that had been collected but which had not been recorded, for the most part, on the books and records of the company.

He said that in a few instances he had helped his partners to prepare fictitious invoices when they wanted to [392] plug in some of that money into the business and into their receipts, when the company needed additional funds.

He said that at all times they had wanted to pay their income taxes on their entire income, but that they were afraid they would lose their license if they showed those excess charges that had been collected.

He said that he and both of his partners had collected these excess charges on occasions. Whenever he would collect them would be when Bill Shubin was in conference or an occasion similar to that.

He said that he was in general charge of the plant and that he allocated the meat to the different dealers. He said that the overcharges were not collected from everyone impartially; they collected different sums from different ones, that is, overcharges. Usually the overcharges were collected in cash and that such overcharges were kept by Bill Shubin at his home.

He said that on one occasion he needed some money and he asked Bill where the money was kept and Bill told him it was home in a drawer; and that he went to Bill's home and searched for half an hour or so for it, for that

(Testimony of Donald Oliver Bircher)

amount, and could not find the fund. He said that he was sometimes worried because he didn't know where Bill Shubin kept this fund of overcharges, because he didn't know what would happen in case he died. And he said that both he and Frederick Shubin [393] fully trusted Bill Shubin to keep the money together and make a fair distribution to them all.

That is about all I can remember.

Q. At this conference of August 1, 1945, and at the two conferences on July 24, 1945, was anything said about the investigation being continued by the Internal Revenue Bureau after those meetings?

A. Yes. I told them that we would want to make an audit of their records, go out and check their records and verify their income. They assured us of their continued cooperation to make everything available. [394]

Q. And did you subsequent to those two dates, July 24, 1945, and August 1, 1945, conduct an audit or assign anyone else to conduct an examination and audit of the books of the Vernon Hotel and Restaurant Supply Company?

A. I can say this, that Special Agent Phoebus was working with me or under me and he continued the assignment in cooperation with Internal Revenue Agent Eustice who was assigned from the Internal Revenue office to carry on.

Q. Is that the agent Eustice who testified here today?

A. Yes, that is correct.

(Testimony of Donald Oliver Bircher)

Q. And did you from time to time thereafter or did you at any time thereafter have any conferences with Mr. Eustice concerning the accounts and the books of the Vernon Hotel and Restaurant Supply Company as his investigation progressed?

A. Yes. I kept in touch with the two men that were out there making the audit.

Q. Was there any discussion at any one of these three meetings with any one or all of the defendants as to whether the defendants had discussed this entire matter of overcharges?

Mr. McLaughlin: Just a moment. With whom?

Mr. Strong: Among themselves.

Mr. McLaughlin: It is objected to as leading.

The Court: The question does not suggest the answer. He could say no or yes. You may answer. [395]

The Witness: Yes.

Q. By Mr. Strong: Will you state at what meeting such a discussion was held and with whom?

A. I asked each of the three partners whether they kept track of how much the overcharges were amounting to at different periods and they said they did, and Bill Shubin said that occasionally the men would ask him, his two partners, how much the fund amounted to. He said sometimes he would tell them that they would have to wait until he could count it and that he would advise them after he had counted it.

(Testimony of Donald Oliver Bircher)

Each of them said that they were to share equally in the fund, in the profits of the business, both the regular income and the overcharges.

Mr. Strong: That is all.

Mr. McLaughlin: No questions.

The Court: That is all.

(Witness excused.)

The Court: Ladies and gentlemen of the jury, you will remember the admonition I have heretofore given you. You will not discuss this matter among yourselves nor permit anyone to discuss it in your presence. You will not express or form any opinion as to the merits of this controversy until it is finally submitted to you under the instructions of the court. We will take a recess. [396]

(Short recess.)

The Court: Stipulate that the jury are present, gentlemen?

Mr. McLaughlin: So stipulated.

Mr. Strong: So stipulated.

The Court: Stipulate that the defendants are in court?

Mr. Strong: So stipulated.

Mr. McLaughlin: So stipulated.

The Court: Proceed.

Mr. Neukom: May it please your Honor, the government has seen fit not to produce evidence as to certain courts, and I would like for the purpose of the record

and since we have not produced such evidence it is obvious that the court will dismiss those counts. They are as follows, your Honor. Count 12, 13, 14, 15, 19, 26, 27, 28, 29, 34, 35, 36, 37, 38, 39, and 40.

In checking the evidence your Honor, I feel that we have produced evidence on all of the other remaining counts that I did not name at this time, your Honor.

The Court: No objection?

Mr. McLaughlin: No objection, your Honor.

The Court: The motion of the government to dismiss counts 12, 13, 14, 15, 19, 26, 27, 28, 29, 34, 35, 36, 37, 38, 39, and 40 will be granted.

Mr. Strong: At this time, your Honor, I think there are [397] some documents which were marked for identification which have not been introduced in evidence. I would like to offer in evidence Government's Exhibits 1 and 2 which are the bank records.

Mr. McLaughlin: We object on the ground that they are immaterial.

The Court: In evidence.

The Clerk: Government's Exhibits 1 and 2 received in evidence.

(The documents referred to were received in evidence and marked Government's Exhibits 1 and 2.)

## [GOVERNMENT'S EXHIBIT NO. 1]

SUBJ: Wm. A. or Julia T.

No. 436

SURNAME FIRST

CURRENT DATA FROM OLD CARD

MINIMUM QUARTERLY BALANCES

1ST OR  
3RD \$2ND OR  
4TH \$

NUMBER OF WITHDRAWALS

SIGNATURE OF CUSTOMER

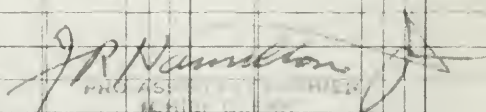
SIGNATURE OF CUSTOMER

SHEET No. \_\_\_\_\_

(ACCT. TRANSFERRED FROM  
BRANCH No. \_\_\_\_\_ ACCT. No. \_\_\_\_\_)

DATE	INTEREST	WITHDRAWAL	DEPOSIT	BALANCE
BROUGHT FORWARD				
12/23/43			140.00	140.00
2/14/44			50.00	190.00
5/25/44			150.00	340.00
Int. Pmt. 80				
6/30/44	.32	Compared		340.32
7/26/44			100.00	440.32
9/14/44			100.00	540.32
Int. Pmt. 81				
12/31/44	1.70			542.02
1/13/45		Compared	200.00	742.02
2/9/45			50.00	792.02
5/3/45			100.00	892.02
5/24/45			50.00	942.02
Int. Pmt. 82				
6/30/45	3.33			945.35
6/28/45			50.00	995.35
9/11/45			100.00	1095.35
10/3/45			50.00	1145.35
11/14/45			50.00	1195.35
Int. Pmt. 83				
12/31/45	5.21			1200.56
1/3/46		1200.56		0

Declared a true copy of Banks record.

Bank of America N. T. & S. A.  
Bell Branch.


Case No. 18367 Cr. .... vs. Shubin. Gov. Exhibit. Date 6/18/46. No. 1 Identification. Date 6/20/46. No. 1 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.



## [GOVERNMENT'S EXHIBIT NO. 2]

JAMES H. A. or J. T.

No. 2179

SURNAME FIRST

"Declared a true copy of Banks record"

SIGNATURE OF CUSTOMER

Bank of America N. Y. & S. A.  
Bell Branch.

SIGNATURE OF CUSTOMER

J. T. Assistant Cashier  
(Chief Clerk)

SHEET No.

CURRENT DATA FROM OLD CARD

MINIMUM QUARTERLY BALANCES

1ST OR  
3RD \$2ND OR  
4TH \$

NUMBER OF WITHDRAWALS

(ACCT. TRANSFERRED FROM  
BRANCH NO. ACCT. NO.)

DATE	INTEREST	WITHDRAWAL	DEPOSIT	BALANCE
BOUGHT FORWARD				
12/17/41		10.00		548.02
12/31/41	.61			538.02
2/27/41		228.00		538.63
1/12/42			100.00	310.63
1/30/42			10.00	410.63
2/18/42	Compared		25.00	420.63
3/23/42		35.00		445.63
3/25/42		15.00		410.63
4/10/42			30.00	\$95.63
4/15/42		209.87		425.63
4/23/42			10.00	215.76
5/1/42			18.24	225.76
5/7/42			25.00	244.00
5/13/42			10.00	269.00
5/20/42			21.00	279.00
5/28/42			17.00	300.00
6/2/42			10.00	317.00
6/15/42			20.00	327.00
6/30/42	1.76			347.00
7/22/42	Compared		25.00	348.76
7/2/42			20.00	373.76
7/9/42			6.24	393.76
7/17/42			20.00	400.00
7/23/42			10.00	420.00
8/10/42			15.00	430.00
8/12/42			5.00	445.00
8/3/42			20.00	450.00
8/10/42			7.00	470.00
8/23/42			20.00	477.00
10/1/42			3.00	497.00
10/6/42			20.00	505.00
10/16/42			10.00	525.00
10/30/42			10.00	535.00
			10.00	545.00
FORWARD				BALANCE FORWARD



## (Government's Exhibit No. 2)

SHUBIN: W. A. or J. T.

No. 2179

SURNAME FIRST

SHEET No

DATE	INTEREST	WITHDRAWAL	DEPOSIT	BALANCE
BROUGHT FORWARD			BALANCE FORWARD	545.00
11/4/42			10.00	560.00
12/3/42			100.00	660.00
Int. Pmt. 77 12/31/42	2.84	Compared		662.84
12/30/42			20.00	682.84
1/3/43			110.00	792.84
1/19/43			14.16	807.00
1/28/43			10.00	817.00
2/4/43			35.00	852.00
2/17/43			30.00	882.00
2/24/43			10.00	892.00
3/25/43			21.00	913.00
4/2/43			29.00	942.00
4/1/43			10.00	952.00
4/15/43			232.00	1184.00
4/16/43			18.00	1202.00
4/22/43			10.00	1212.00
Int. Pmt. 78 5/30/43	5.49			1217.49
7/15/43			10.00	1227.49
7/26/43			80.51	1308.00
9/10/43			40.00	1348.00
10/16/43			55.00	1403.00
1/1/44			130.00	1533.00
1/3/44			25.00	1558.00
11/24/43			36.00	1594.00
Int. Pmt. 79 12/31/43	5.89	Compared		1599.89
1/13/44			21.00	1620.89
1/21/44			21.00	1641.89
2/14/44		1600.00		41.89
2/17/44			100.00	141.89
2/1/44			4500.00	4641.89
9/14/44			115.00	4756.89
10/1/44			2127.05	6883.94
Int. Pmt. 81 12/31/44	11.74			6895.68
1/19/45		5200.00		1695.68
Int. Pmt. 82 2/10/45	8.48			1704.16
2/11/45		470.00		1234.16
Int. Pmt. 83 12/31/45	6.18			1240.34
1/3/46			249.68	1490.02
1/3/46		1200.00		290.02

Case No. 18364a vs. Shubin  
 EXHIBIT  
 Date 6/14/44 No. 2  
 Date 6/20/44 No. 2  
 Clerk, U. S. District Court, Sou. Dist. of Calif.  
 Deputy Clerk



Mr. Strong: Government's Exhibit 23 which also are bank records.

The Court: Subject to the same objection, in evidence.

The Clerk: Government Exhibit 23 admitted into evidence.

(The documents referred to were received in evidence and marked Government's Exhibit No. 23.)

Mr. Strong: Then I would like to offer in evidence these certified income tax returns.

The Court: For the partnership?

Mr. Strong: First the partnership, yes. They are exhibits 46, 47, 48 and 49.

Mr. McLaughlin: To which we object on the ground that they are immaterial and not probative of any issues in this case and were not obtained pursuant to the laws and regula- [398] tions with respect to such returns.

The Court: Admitted in evidence.

The Clerk: Government's Exhibits 46, 47, 48 and 49 admitted into evidence.

(The documents referred to were received in evidence and marked Government's Exhibits 46, 47, 48 and 49.)

Mr. Strong: At this time I would like to offer in evidence certified copies of the individual income tax returns Nos. 35 to 45 inclusive.

Mr. McLaughlin: We object to those on the ground that they are immaterial and not probative of any issue in this case and that they were not obtained pursuant to the laws and regulations relating to obtaining of such documents and that they are privileged.

Mr. Strong: Your Honor, these documents are neither privileged nor were they obtained not in pursuance to law. They were obviously obtained pursuant to the provisions of law, otherwise they would not have been issued. They are issued and certified copies and under the provisions of Section 661 of Chapter 17, Title 28 U. S. Code, they are admissible in evidence.

The Court: No, I don't believe they were secured in accordance with the statute of regulations, the individual returns. The motion of the defense will be sustained.

Mr. Strong: The government rests. [399]

The Court: Does the defense wish to make an opening statement, Mr. McLaughlin?

Mr. McLaughlin: Your Honor, I would like to make some motions and I am not going to take up any time arguing them either at this time, but I would like to have five or 10 minutes to make them.

The Court: Yes. Approach the bench. Do you want to make them in the absence of the jury or at the bench?

Mr. McLaughlin: I think I would rather make them in the absence of the jury.

The Court: You may approach the bench.

Mr. McLaughlin: Your Honor, in other words I would prefer to make the motions so that my clients can hear me. In other words, I am representing them that I feel that they should know what is happening on this particular matter.

The Court: Ladies and gentlemen of the jury, you will remember the admonition I have heretofore given you. You will not discuss this matter among yourselves nor permit anyone to discuss it in your presence. You will not express or form any opinion as to the merits of this con-



troversy until it is finally submitted to you under the instructions of the court.

If you will retire now to the jury room I will call you as soon as the lawyers are finished. It will be just a few minutes. [400]

A Juror: Your Honor, will it be permissible to take this with me?

The Court: I think not because you are not really in session.

(Thereupon, the jury retired from the court room and the following proceedings were had:)

Mr. McLaughlin: May I proceed, your Honor?

The Court: Yes.

Mr. McLaughlin: Your Honor, the first motion I wish to make is a motion to strike all the testimony that was given by Mr. Bircher and the testimony which was given by Mr. Phoebus, and the testimony that was given by the other agent for the Department of Internal Revenue, Mr. Eustice, and the grounds upon which said motion is premised is that the information that those witnesses obtained was obtained in the course of their duty in connection with securing information from these defendants which the defendants gave pursuant or in connection with their income tax returns and that it is a violation of the rule against search and seizure to permit them to testify to such matters, and on the further ground that the evidence shows that those witnesses used documents which are not admissible in evidence to refresh their recollection and that therefore their testimony should be stricken. That is the first motion, your Honor.

The Court: Denied and exception allowed. [401]



Mr. McLaughlin: Now, the next motion that I wish to make, your Honor, I have some motions for judgments of acquittal pursuant to the new rule which I think states that a motion for judgment or acquittal is the proper way to raise these. That is Rule 29, subsection A.

The Court: That is right.

Mr. McLaughlin: The first motion that I wish to make is a motion for judgment of acquittal in behalf of the defendant Frederick Shubin as to all counts in the indictment with the exception of count 1 and the grounds of that motion are that there is no evidence which connects Frederick Shubin up with any of the allegations or any of the charges set forth in any of those counts which remain in the indictment that haven't already been dismissed.

There has been no testimony of any witness of any specific overcharge or any specific transaction with respect to Frederick Shubin and the only testimony that has been given with respect to that at all was the testimony of Mr. Bircher which was the testimony that at most, if it has any value, would go to prove count 1 because it was general testimony that he knew about overcharges that the firm was making.

The Court: Motion will be denied and exception allowed.

Mr. McLaughlin: The next motion which I wish to make, your Honor, is a like motion in behalf of Frederick Shubin as to count 1 and the grounds on which that motion is made is [402] that there is no evidence of any conspiracy and no evidence of any overt act on the part of Frederick Shubin as charged in count 1.

The Court: The motion will be denied and exception allowed the defendant.

Mr. McLaughlin: I wish to make a like motion on behalf of William Shubin as to count 1, your Honor.

The Court: The motion will be denied and exception allowed the defendant.

Mr. McLaughlin: I wish to make a like motion on the same grounds as the preceding motions as to Jack Kissel as to count 1.

The Court: The motion will be denied and exception allowed.

Mr. McLaughlin: Now, your Honor, in addition to the counts which counsel have voluntarily dismissed, I wish to make a motion to dismiss certain other counts and I think they might verify the fact. I believe they overlooked some of those that they put in no invoices on according to my records.

The first count that there is no evidence in support of, no invoice or anything, is count 10. This relates to a Mr. Snider and the invoice number is 47443. I am quite sure there is no exhibit, your Honor, in on that.

Mr. Strong: Exhibit 34. [403]

The Court: Yes, I have that in my notes.

Mr. McLaughlin: That is Exhibit 34?

Mr. Strong: Government's Exhibit 34.

Mr. McLaughlin: All right. The next one is count——

The Court: Let me make a record of that. The motion is denied.

Mr. McLaughlin: The next one is count 23. That is also Snider.

Mr. Strong: Government's Exhibit 32.

The Court: Exhibit 32. I have it in my notes. The motion will be denied.

Mr. McLaughlin: The next one is count 25.

The Court: Government's Exhibit 33.

Mr. Strong: Yes, your Honor.

The Court: I have it in my records. The motion will be denied.

Any others, Mr. McLaughlin?

Mr. McLaughlin: Yes, your Honor. Counts 20 and 21. They are Emil Dvorak.

Mr. Strong: Exhibit 16 for count 20 and Exhibit 17 for count 21.

Mr. McLaughlin: Which one is for count 21?

Mr. Strong: Exhibit 17.

Mr. Neukom: Those tally, your Honor.

The Court: Miss Bennallack, read that to me, those ex- [404] hibit numbers.

(Record read.)

The Court: Exhibit 16 is for count 20, Exhibit 17 for count 21, and Exhibit 18 for count 22.

Mr. Strong: That is right, your Honor.

The Court: The motion will be denied.

Mr. McLaughlin: Your Honor, I wish to make a motion for a judgment of acquittal as to all counts involving Emil Dvorak as to all three defendants, and the grounds of that motion are that there is no evidence that the defendants, or any of them, ever caused or required or requested Emil Dvorak to pay any overcharges.

He was asked that question and he pointblank said that they never did make any such request or requirement, and those counts are 2, 3, 4, 5, 6, 7, 8, 9, 16, 17, 18, 20, 21, 22, and that is all of the Dvorak counts.

The Court: But he testified that he did pay the overcharges. Overruled. Denied.

Mr. McLaughlin: Your Honor, I now want to repeat my motion in behalf of all the defendants for a judgment of acquittal as to all of these counts on the ground that the government has failed to prove that the regulations or any of the regulations involved in this case have been duly promulgated and alleged in the indictment, and on the further ground that they have failed to prove knowledge of the [405] terms and provisions of those regulations which they claim were violated, and I will submit that now.

At some time during the trial I would like to cite some authorities on that.

The Court: You can hand them to the court and I will read them while I am hearing the case, Mr. McLaughlin. The motion will be denied and exception allowed the defendants.

Mr. McLaughlin: Your Honor, that is all the motions that I have.

The Court: All right, call the jury.

Mr. McLaughlin: Before the jury is called, your Honor, may I bring up one other matter?

The Court: Yes.

Mr. McLaughlin: I understand that Mr. Phoebus and Mr. Schlick are under subpoena by the government. They are the two Internal Revenue Agents, and with that understanding I haven't subpoenaed them, and I understand that they are in the building. I asked Mr. Strong if they are under subpoena and he stated that they were under subpoena by the government but that I could not call them, and I would like to have a clarification on that be-

cause I want to call these two gentlemen and ask them a question regarding this investigation that they made.

Mr. Strong: Well, if your Honor please, all I stated was that their authority extended no further than the authority [406] for the government and that furthermore the authority only extends to their testifying as witnesses for the government, and I don't know that they have authority under the law. I wouldn't want to put them in the position of committing a misdemeanor by testifying without having been duly authorized by the Commissioner.

That is the point raised by counsel with some success as to some testimony, and the authority says, "You are hereby authorized to cooperate with Charles H. Carr and to furnish any pertinent documents and appear in response to subpoena in any proceedings as witnesses for the government."

Now, there is a provision in the regulations whereby other parties besides the government can procure the testimony of these agents and that again requires writing letters as counsel pointed out I had to do in getting the various authority for them to come here. Had I called these people as witnesses and questioned them, there would not be any doubt as to counsel's right to cross examine as to matters, but if he is going to call them as his own witnesses I think he can only do so pursuant to specific authority as provided by law.

The Court: Oh, I don't believe so. I believe when a witness is called by either side—it certainly would shock the conscience of the court if a witness could be called by either side and then say to the other side, "While we admit [407] you can cross examine fully on the questions

we brought out, you can't ask any other questions and you can't call them as your own witness."

Mr. Strong: I didn't mean to leave that impression, your Honor. They were not called by the government at all.

Mr. McLaughlin: Mr. Phoebus was on the stand.

Mr. Strong: And they only testified as to the Vernon Hotel and Restaurant Supply Company, not as to the individuals. Of course he can be questioned as to anything that he has authority to testify about. I am just talking about——

The Court: I don't think the government has a right to say to one of its representatives, "Now, you can only testify favorably to the government. You can't go on the stand and testify against the government." That would shock the conscience of the court.

Mr. Strong: I am not trying to say that, your Honor, but that just possibly there is some question as to their authority under the law in connection with testifying in respect to other matters asked by counsel, since your Honor has ruled that our authority was strictly limited to certain lines. Aside from that I am not raising any question.

The Court: I am just directing my remarks to the witness who testified.

Mr. Strong: Yes.

The Court: And I am in great doubt about any other [408] government witness who is protected by the statute that the defense have so strenuously urged here and with which I have agreed in part.

Mr. Strong: I didn't mean to object to their calling a witness who has testified. I only intended to refer to those who haven't been called.

The Court: All right.

Mr. McLaughlin: May I ask if Mr. Phoebus or Mr. Schlick are in the court room at this time? Mr. Phoebus?

Mr. Phoebus: Yes, sir.

Mr. McLaughlin: And Mr. Schlick?

Mr. Schlick: Yes, sir.

Mr. McLaughlin: Thank you. I have no other comment, your Honor.

The Court: Mr. Phoebus did testify but Mr. Schlick did not.

Mr. McLaughlin: That is right.

The Court: Well, you remain in the court room, Mr. Schlick, and I will permit you to be put on the stand until I see how far the examination goes and at that time I will make a ruling.

Call the jury. Let the record show that all the matters have been without the presence of the jury.

Mr. Strong: So stipulated.

Mr. McLaughlin: So stipulated. [409]

(Thereupon, the jury returned to the court room and the following proceedings were resumed in their presence:)

The Court: Stipulate that the jury are present, gentlemen?

Mr. Strong: So stipulated.

Mr. McLaughlin: So stipulated.

The Court: Mr. McLaughlin, did you wish to make an opening statement?

Mr. McLaughlin: I will call Mr. Phoebus.

The Court: Stipulate that the defendants are in court?

Mr. McLaughlin: So stipulated.

Mr. Strong: So stipulated.



SAMUEL J. PHOEBUS

called as a witness on behalf of the defendants, being previously duly sworn, was examined and testified as follows:

The Court: Mr. Phoebus, you have been sworn?

The Witness: Yes, sir.

Direct Examination

By Mr. McLaughlin:

Q. Mr. Phoebus, you have already been sworn in this case and testified, I believe, that you knew the defendants William Shubin, Frederick Shubin, and Jack Kissel?

A. Yes, sir.

Q. Did you have any discussion with either of them or any of them regarding the use or the disclosure of what they [410] told you to anyone else? A. Yes.

Q. Will you state when you had that discussion?

A. At the time that Mr. Eustice, the Internal Revenue Agent, and I were at their place of business making the audit.

Q. Now, can you fix that? It was in August of 1945 I presume but can you fix the approximate time in August, Mr. Phoebus?

A. Well, I would not presume it was in August.

Q. I see.

A. It occurred at some time during the two and one-half months of the course of the audit. In other words I would have difficulty as Mr. Eustice had difficulty in placing any particular time on it whether it occurred during our first discussion or in connection with some other item that we were discussing.

(Testimony of Samuel J. Proebus)

Q. It could have been the first time you met William Shubin, could it?

A. It could have been that time, yes.

Q. And Mr. Shubin was present and William Shubin and was there anyone else present?

A. I think Jack Kissel was present too.

Q. All right. Now, will you state what you said on that occasion with respect to the government disclosures, what was said about either you disclosing it or your depart- [411] ment disclosing it?

A. I would like to point out that I merely said that it could have been. I mean my memory is not strong enough on this point to say that it was discussed. I remember occasions during the course of the audit when it was discussed but if it is permissible I could reproduce in part what my memory indicated as to the conversation which Mr. Schlick and I had with Bill Shubin at the first time I talked to them, and as I reflect it inwardly in my mind it appears to me that this could not have been said at the time because of the topics which we discussed on our first meeting.

Q. Well, first as near as you can when you had this discussion, whether it was the first or the second or what.

A. I would be inclined to think it was the latter part of September.

Q. And was it at the plant of the defendants?

A. It was at the plant of the defendants.

(Testimony of Samuel J. Proebus)

Q. Now, state what was said.

A. Bill Shubin expressed the fear that the matters which we were discussing would be revealed to the OPA and I told him that regardless of the origin of the funds or what illegitimate business the taxpayer might be in that it was the policy of the Bureau to consider these returns confidential, and either on that occasion or another occasion I pointed out to him that even in court that I could not testify in relation to [412] the things which he was telling us unless I was authorized to do so.

Mr. McLaughlin: That is all, Mr. Phoebus.

Cross Examination

By Mr. Strong:

Q. This conversation that you had, that was after the conference that you or Mr. Bircher had in the office at which the attorneys for the defendants were present?

A. Yes, sir.

Q. And you heard Mr. Bircher testify as to what was said to them at the conference?

A. Yes, sir.

Q. Is that your recollection of what was said to them?

A. Yes, sir.

Q. And did the defendants or their attorneys at these conferences indicate in any way that they had made any independent investigation as to this matter?

A. They did.

Q. And that they were satisfied to permit their clients to testify?

A. Yes, sir.

(Testimony of Samuel J. Proebus)

Q. And you have now been authorized or directed by the Commissioner of Internal Revenue to give this evidence in this court? A. Yes. [413]

Mr. Strong: That is all.

#### Redirect Examination

By Mr. McLaughlin:

Q. Mr. Phoebus, can you fix approximately the time of this discussion with relation to the time Mr. Shubin made this statement in the office of the Bureau? How much time elapsed between those two events?

A. The statement was given in the office on July 24th and as I just testified the conversation which I testified to was some time in the latter part of September.

Q. When did you first go to the plant of the defendants?

A. During the first two weeks of August, August 7th I believe it was, but I am not sure of that date. I have it, of course, in my diary.

Mr. McLaughlin: That is all.

#### Recross Examination

By Mr. Strong:

Q. That is September of 1945? A. Yes, sir.

Q. August of 1945 also? A. Yes, sir.

Q. And the conference was July of 1945?

A. Yes, sir.

Mr. Strong: That is all.

(Witness excused.) [414]

Mr. McLaughlin: I will call Mr. Schlick.

WALTER E. SCHLICK

called as a witness on behalf of the defendants, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your full name?

The Witness: Walter E. Schlick.

Direct Examination

By Mr. McLaughlin:

Q. Where do you reside, Mr. Schlick?

A. 1520 Marcedenia, Torrance, California.

Q. What is your occupation?

A. Special agent of the Intelligence Unit, Treasury Department.

Q. And you work with Mr. Phoebus at times?

A. Yes, at times.

Q. Are you acquainted with the defendants in this action, William Shubin, Frederick Shubin and Jack Kissel?

A. Yes, sir.

Q. Do you recall a discussion that you were present at regarding your department revealing information that they gave you?

A. Yes, sir.

Q. Will you state when that took place as near as you can, Mr. Schlick?

A. The date will have to be established as being an [415] approximation. As has been previously testified when the investigation continued over a period of time conversations are had at various intervals and as to segregate any particular conversation with reference to any particular date, it is physically impossible. I would say that as near as I can recall that particular conversation was in the latter part of August or the first part of September of 1945.

(Testimony of Walter E. Schlick)

Q. And that was at the plant of the Shubins?

A. Yes, sir.

Q. Will you state what you said and what they said as near as you can?

A. The conversation was relative to the confidential matters which were being discussed at that time which, of course, so far as we were concerned, was merely income tax matters and the defendants were concerned about the information becoming common knowledge to the OPA officials.

We could not conscientiously assure them that the information would never be made known to them, but we did say that it is the policy of the Bureau to not divulge that information, that information given in the course of a tax investigation is inviolate and is confidential and should not be revealed to anyone except those authorized by the Treasury Department.

Q. Is that substantially all?

A. I think so. [416]

Mr. McLaughlin: Thank you.

Mr. Strong: No questions.

The Court: That is all.

(Witness excused.)

Mr. McLaughlin: Your Honor, I desire to call Mr. Strong.

The Court: All right.

Mr. Strong: I don't know whether I am authorized to testify in these proceedings, your Honor.

Mr. McLaughlin: We will let the court decide.

The Court: I will determine that.

Mr. McLaughlin: We haven't gotten any help yet and I am going to try and get some now.

WILLIAM STRONG

called as a witness on behalf of the defendants, being first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: William Strong.

Direct Examination

Mr. Strong: I might say that I testified in one proceeding and was later told that I had no right to do so, and that is why I mentioned it.

By Mr. McLaughlin:

Q. Mr. Strong, you are connected with the office of the United States Attorney in the Southern District of California? A. Yes, sir.

Q. And will you state what your title or your capacity is?

A. Special Assistant to the United States Attorney.

Q. And how long have you been so connected?

A. Approximately a year or slightly over a year.

Q. Do you recall this letter of September 27, 1945, that is in evidence as part of Exhibit 55 which was sent to the Attorney-General?

A. The one that I wrote, you mean?

Q. Yes. A. Yes.

Q. Now, after you wrote that communication, Mr. Strong, how long was it before you saw the statements which I will show you and which are marked for identification as Exhibits 50, 51 and 52?

A. I can't say exactly how long, but I can state that I saw those statements after the Internal Revenue Agents had received the letters of authority from the Commissioner of Internal Revenue to show me those.



(Testimony of William Strong)

Q. Yes. Mr. Strong, to refresh your mind, I think those are dated October 10, 1945.

A. It was after whatever the date was that they received those letters. [418]

Q. When you say those letters, you have reference to these three letters that are in evidence as Exhibits 53, 56 and 54? A. That is right.

Q. Have you any way of fixing how long after it was that you received those letters?

A. No, it is very hard to say. I was engaged in conducting a grand jury investigation which is not as yet completed. We are still conducting it and I was examining a large volume of documents at all times and I was talking with witnesses on all sorts of matters. There were hundreds of witnesses and it is almost impossible to even try to localize the date, but I would say it was shortly after those letters were received by the Internal Revenue agents.

Q. And as soon as they were delivered to you, you read them through?

A. I don't remember whether I read them through as soon as they were delivered. I read them through at one point or another.

Q. Would you say it was in October of 1945 that you read them through?

A. I can't say that because I was handling cases on appeal at the same time, cases on trial and on Wednesday squeezing in the grand jury investigation. I really couldn't specify any date, but I should imagine that I must [419] have read those statements shortly after they were given to me because I was curious to know what was in them, but the exact date I don't know.

(Testimony of William Strong)

Q. And at the time you were working on an investigation, a grand jury investigation, relating to these defendants?

A. I was working on a grand jury investigation relating to a large number of concerns and individuals and I couldn't say honestly now that these defendants were at all implicated or being investigated at that time.

Specifically I remember one of the concerns being investigated was the Southern California Meat Company. That company had a large number of customers and one of the customers of that company was the Vernon Hotel and Restaurant Supply Company. I interviewed a large number of people who had dealings with the Southern California Meat Company and that was the first time that I got in contact or happened to talk to the people representing the Vernon Hotel and Restaurant Supply Company, but where they came in, what date they came in, it is very hard to say. We had so many witnesses and people that we talked to that it is very hard to say.

Q. Well, could you fix it the latter part of June of 1945?

A. Yes. I should imagine it would be about that time. [420]

Q. During the time that the grand jury investigation was proceeding?

A. Yes. The grand jury has never been dismissed. It has been continued over by court order.

Q. Did you discuss these statements marked Exhibits 50, 51 and 52 for identification with any representatives of the Bureau of Internal Revenue?

The Court: They are in evidence.

Mr. McLaughlin: I didn't hear you.

(Testimony of William Strong)

The Court: They are in evidence, not for identification.

Mr. McLaughlin: No, they are not in evidence, your Honor. These three were not received.

The Court: Oh, all right.

The Witness: Did I discuss them with them?

Q. By Mr. McLaughlin: Yes.

A. You mean the physical documents or the contents?

Q. Well, did you discuss the contents of the documents?

A. I don't remember having discussed it except possibly to remark about certain things in it on some occasions, but there was no discussion of the documents or statements in it in detail at all at any time.

Q. Well, who did you have any discussion with? You said you remarked about some of the items.

A. Oh. When they brought them down I remember that they said these were part of the material that they had and [421] I then glanced through them and asked them in general of what it was comprised and what it had to do with, but I didn't go into any questions and answers.

Q. And they left them with you when they brought them down?

A. Yes, and I think I had them in my possession at all times since the time they left them there. I don't remember their ever going out of my possession. They are very important documents to us.

Mr. Neukom: Your Honor, may I object to this? This matter does not go into any issues of the case itself. Consequently I think it is a matter, while I don't object to the jury being here, it nevertheless does not prove or

(Testimony of William Strong)

disprove any of the issues of the case. It might go to an appropriate motion had counsel seen fit to file it on his motion to quash, but there is nothing factual in this testimony.

It is the procedure that may have been followed or may not have been followed by the government but whatever Mr. Strong may have done or may not have done he could not bind the government contrary to what is proper. The grand jury has heard this proceeding. A true bill was issued and the matter is now before the court on a factual proposition and I don't think what Mr. Strong did or did not do has any materiality.

The Court: I don't think so either, but I am going to [422] permit counsel to ask some more questions.

Mr. McLaughlin: Was the last question answered?

The Reporter: Yes.

Q. By Mr. McLaughlin: Who were the men that brought them down?

A. I don't remember that either. However, it probably was Mr. Bircher. I think Mr. Bircher and Mr. Phoebus might have been the two. I don't remember seeing Mr. Eustice there and I don't remember seeing Mr. Schlick.

Q. After the first occasion when they brought them to you, did you discuss the contents of those documents with any representatives of the Department of Internal Revenue?

A. I don't think I ever discussed the contents of those documents except to remark as to one or two things possibly, and to ask for some further material. One of those documents for example reveals that there was an accountant's report which is in evidence and I asked for that report.

(Testimony of William Strong)

Q. You asked one of the representatives of the Department of Internal Revenue for that report?

A. I think I asked Mr. Bircher for that report.

Q. That is this report in evidence as Exhibit 58?

A. Yes.

Q. Now, did you use the information that you obtained from these three statements to which I am referring in any [423] way in connection with the grand jury?

Mr. Neukom: That is objected to as being wholly immaterial.

The Court: Sustained. I have listened to this extensively but I don't believe that we are going to try the grand jury in here. The grand jury had their duty to perform and they performed the duty and I don't believe we have any right to call the grand jury in here and start another case. It is entirely collateral. All right.

Mr. McLaughlin: Well, your Honor, I suppose that the record should show and I think that I may state it without being prejudicial in any way with the jury being present—it goes to the objection I made all the way through on these documents.

I am claiming that they were obtained by the government unlawfully and it is a search and seizure proposition that I argued to your Honor previously in this case, and I want to show that the United States Government has used documents that they obtained without right and not pursuant to the law for the purpose of getting an indictment against these parties.

Now, that is the sole purpose of this line of testimony.

The Court: But you stated to the court that you had absolutely no evidence of that at all but that you were just on a fishing expedition to find out if that was true.

(Testimony of William Strong)

I asked you that in your argument and you said that you had no [424] evidence of it but that you wanted to find out.

Mr. McLaughlin: Your Honor, I can say now that I am proceeding on the theory that my defendants have the right to find out. In other words, it is possible that they had these before the grand jury investigation was hardly under way.

The Court: The government told you that they never used any of these in the grand jury investigation.

Mr. McLaughlin: I am merely making my record and that is all I care about.

The Court: All right. You have made it.

(Witness excused.) [425]

Mr. McLaughlin: I would like to call Mr. Brady.

JOSEPH D. BRADY

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Joseph D. Brady.

The Clerk: B-r-a-d-y?

The Witness: That is right.

Direct Examination

By Mr. McLaughlin:

Q. Where do you reside, Mr. Brady?

A. Los Angeles.

Q. What is your occupation?

A. I am an attorney at law, but I have been specializing for many years in income tax matters.

(Testimony of Joseph D. Brady)

Q. How long have you specialized in the income tax law practice? A. 24 years.

Q. Are you acquainted with William Shubin, Frederick Shubin, and Jack Kissel? A. I am.

Q. Did these gentlemen come to you during the year of 1945 on some professional matter?

A. They did. [426]

Q. Was that a matter involving taxation?

A. That is right.

Q. After these gentlemen talked to you regarding their problem did you contact anyone connected with the Bureau of Internal Revenue, either in Los Angeles or Washington, D. C., regarding that matter? A. I did.

Q. Will you state approximately when and who that was?

A. Well, my first contact was within ten minutes of the first time I ever saw any of the gentlemen you have named, and the first one that I saw was Mr. William Shubin. I believe he was alone when I first met him. I immediately got on the long distance telephone with Washington, D. C., and talked with Mr. Timothy Mooney, who, for many years, had been Deputy Commissioner of Internal Revenue, but who had resigned about a year before.

The Court: That is not admissible.

Mr. Neukom: This is collateral.

The Court: That is not admissible at all, who he talked to in Washington. Proceed, counsel.

Q. By Mr. McLaughlin: Mr. Brady, tell us about the first discussion you had with anyone connected with the Bureau of Internal Revenue, that was then connected?

A. With Mr. George D. Martin, who was the Internal Revenue Agent in charge in Los Angeles, California. [427]



(Testimony of Joseph D. Brady)

Q. Where was that conversation?

A. In his office.

Q. And will you state the approximate date?

A. Oh, my recollection is that I was first consulted by these gentlemen in May or June of 1945. My office records would show; but that is my best recollection, and within three or four days of that I called on Mr. Martin.

Q. Anyone present besides you and Mr. Martin?

A. No.

Mr. Neukom: I don't like to interrupt, your Honor, but I think that this is all collateral to any of the issues of this case.

The Court: This is not a tax case that we are trying. This is not a Department of Internal Revenue case, as I understand it.

Mr. McLaughlin: It goes right down to the same proposition again, your Honor, that this information, I propose to prove, was given under the assurance that it would not be used in any litigation at all. And I think that these gentlemen——

The Court: The evidence here shows that they were told it would be used.

Mr. McLaughlin: I have the right to refute that evidence; and furthermore, this was the attorney who went to see the head of the office before these other men ever made [428] that statement.

The Court: You have a right to refute it by the people who stated it; but you haven't a right to refute it by some other party. Can you bring in here 50 people to say, "Why, Mr. Brady went out and he told them this and he told them that"?

(Testimony of Joseph D. Brady)

Mr. McLaughlin: Your Honor, I submit that I have the right to show that Mr. Brady went to the head of the Department here and explained his problem, and that the head of the Department gave him an assurance that the information that they gave would not be used in litigation or by the OPA.

The Court: Overruled. Proceed.

Q. By Mr. McLaughlin: Mr. Brady, will you state what the conversation was with Mr. Martin?

The Court: The same objection. Overruled.

A. I asked Mr.—

The Court: No. Just a moment. It is not admissible at all. It is not admissible at all. This is not a tax case.

Mr. McLaughlin: You mean sustained?

The Court: Sustained.

Mr. McLaughlin: Your Honor, then, just for the offer of proof: I offer to prove by this witness that he talked to Mr. Martin and to other officials of the Bureau of Internal Revenue and was assured by them that any information that the Shubins gave in connection with the amended tax returns which [429] they were filing would not be used in any criminal proceeding against them in any court.

The Court: Proceed with another question.

Mr. McLaughlin: Your Honor has sustained an objection to the discussion with Mr. Martin?

The Court: Certainly. It has no place at all in this case.

Q. By Mr. McLaughlin: Mr. Brady, did you have discussion with anyone else connected with the Bureau of Internal Revenue regarding that matter?

(Testimony of Joseph D. Brady)

A. Yes; I had discussion with Mr. Bircher, Mr. Donald Bircher, as to the general policy of the Bureau of Internal Revenue.

Q. Will you state about when that was?

A. It was right at the—Mr. Bircher contacted me right within three or four or five days after the amended returns, prepared under my supervision, were filed, and which I think was about June of 1945; as I recall, came to my office to borrow my retained copy of the returns on a Saturday morning.

The Court: Now, a great deal of that is not responsive to the question at all. Strike it out.

Q. By Mr. McLaughlin: Who was present, Mr. Brady? A. How is that?

Q. Who was present besides you and Mr. Bircher? [430]

A. I think Mr. Phoebus was with Mr. Bircher that day.

Q. Will you state what was said on that occasion with respect to the policy of the Government in connection with this information?

A. I couldn't be sure that it was on that occasion, but if it was not on that occasion, it was on a preceding day, over the telephone with Mr. Bircher as to the policy of the Bureau of Internal Revenue in disclosing—

Mr. Neukom: I object to this, your Honor, because, after all, Mr. Bircher cannot bind the Government; and furthermore, as far as the law requires us to produce it, evidence has been produced.

The Court: The contention of the defense, as I take it here, is that the agent of the Government can set aside the statutory requirements, which is something new to the court. In other words, the law provides how and what

(Testimony of Joseph D. Brady)

method and under what circumstances these returns may be used. With reference to the partnership returns it was complied with. It was not complied with as to the individuals and I excluded it.

Now, as I take it, the defense position is that an agent can waive and can set aside the direct mandate of the law. I do not believe that is the law. I do not believe that an agent can bind the Government and set aside a direct provision of law. The law was complied with, the court [431] finds, with reference to the partnership, but it was not complied with with reference to the individuals, and I so held and sustained the objection of the defendants that those returns could not be used, and I sustained the objection of the defendants when the offer again was made with reference to the returns in evidence.

I do not believe that an agent can amend the statute.

All right; let the record show the offer of proof has been made here by the defendants, so the defendants will have every protection under the law.

Mr. McLaughlin: That is all, you Honor.

Mr. Neukom: I just want to ask you one or two questions, Mr. Brady.

#### Cross Examination

By Mr. Neukom:

Q. Mr. Brady, you were present on July the 24th, 1945, when statements were made by William A. Shubin, were you not—I beg your pardon. You were present when the conference was held up in Mr. Bircher's office and Mr. Phoebus' office here in the building?

A. Yes, I was present.

Q. On the eighth floor?

A. Yes.

(Testimony of Joseph D. Brady)

Q. And you brought Mr. William Shubin, and later, Mr. Frederick Shubin to that conference, didn't you? [432]

A. Yes; they were there.

Q. No subpoena had been served on either of them to your knowledge? A. No.

Q. And you came in voluntarily to discuss the matter, didn't you, Mr. Brady?

A. Yes; pursuant to the understanding that I had.

Q. And it is true that at that time, among others, a question such as this was asked of Mr. Shubin before he gave any replies: "You are advised, Mr. Shubin, that any statements you make at this hearing or conference, or any documents produced may be used by the Government in any subsequent proceedings, and that you have the right to refuse to answer any questions that you feel might tend to incriminate you? Do you understand that, or do you wish your attorney to explain it to you?" You recall that such a question or explanation was made by Mr. Bircher to Mr. Shubin? A. That is right.

Q. And Mr. Shubin replied that: "I believe I understand that," did he not?

A. If the record shows, and my recollection is he said substantially that.

Q. And is it not true that you also counselled with Mr. Shubin and there was some, as you attorneys call it, discussion off the record where you advised Mr. Shubin that [433] it was proper to go ahead and answer the interrogatories that were given?

A. I believe that is so.

Q. And it is true that at a later date, a few days later, after this report had been written up or the proceedings had been written up, that Mr. Shubin was

(Testimony of Joseph D. Brady)

accorded the privilege to come to the office of Mr. Bircher here in this building, was given the original and copies of the proceedings that had been taken, and did in your presence sign all of the documents which reflected the questions and answers?

A. That is true, but only after a reiteration of the specific understanding that they were for the eyes of the Treasury Department only.

Mr. Neukom: May I move that the answer be stricken as not responsive?

The Court: That is stricken out, but I am going to permit the witness to state the conversation very completely if the question is asked. If not, I am going to permit the defense counsel to ask the question.

Mr. Neukom: Very well.

The Court: Proceed. Any other questions?

Mr. Neukom: Yes.

Q. And this is Mr. Shubin's signature that was signed to the document in question?

A. It looks like it to me. [434]

Q. And signed on August 13, 1945?

A. I have no doubt that is the date.

Q. And the same policy in general was followed as to Frederick Shubin, only his matter was taken up in the afternoon, wasn't it, Mr. Brady?

A. Oh, I think all the papers were signed at the same time, one particular morning. We may have stayed there until two o'clock.

Q. But I mean they were interrogated upon the same explanations, that whatever might be obtained might be used against them; isn't that correct?

A. The same policy was followed.

(Testimony of Joseph D. Brady)

Mr. Neukom: That is correct. I was referring to what was Government's Exhibit 50 for identification. That is all.

The Court: Mr. McLaughlin?

Redirect Examination

By Mr. McLaughlin:

Q. Mr. Brady, you said that they signed those statements after reiteration of the assurance. Would you state what was said and who said it?

A. Mr. Bircher was there in the early part of the morning. He was not there at the time the statements were signed, but before they were signed, I turned to Mr. Phoebus who was there and I said to Mr. Phoebus: "It is the understanding, is it not, that these are for the eyes of the [435] Treasury Department only?", and he answered, to my recollection, "Yes."

Mr. McLaughlin: That is all.

Mr. Neukom: May I just ask one more question?

Recross Examination

By Mr. Neukom:

Q. Mr. Brady, you have been an attorney for a great many years, have you not? A. 26.

Q. Yes. And, of course, you were acquainted with the doctrine that most lawyers know, that we endeavor to put into writing all of our understandings? In other words, a written document best expresses the understandings of the parties?

The Court: Generally speaking.

A. I don't see how you can apply a generalization of that sort to this situation.



(Testimony of Joseph D. Brady)

The Court: I said, "Generally speaking."

Q. By Mr. Neukom: Mr. Brady, you had a copy of this statement that your client signed at that time, didn't you? Were these given to you? A. Yes.

Q. And you did not insist that any such phraseology or words be incorporated in that document before they signed it, did you? [436]

A. The document can speak for itself.

Q. My question is: Did you?

The Court: Well, I think Mr. Brady has answered it perfectly. He said the document speaks for itself.

Mr. Neukom: Then I offer the document into evidence.

Mr. McLaughlin: Objected to on the ground that it is not probative of any issue, and on the further ground that it is privileged.

Mr. Neukom: Your Honor, I offer it under the partnership aspect alone, as to the limited aspect as it deals with the partnership alone and in view of the answer of the witness. I now feel that we have the right to offer the document.

Mr. McLaughlin: Before a ruling is made thereon, I offer to stipulate that there is nothing in the document whereby Mr. Brady requested that there be anything in writing regarding the understanding he just testified to.

The Court: Under that stipulation of the defense, I will refuse to admit the document into evidence.

Mr. Neukom: Very well, your Honor. That is all, Mr. Brady.

Mr. McLaughlin: That is all, Mr. Brady. Thank you.

Pardon me just a moment, your Honor. Your Honor, the defense has no further witnesses or evidence to offer in this case.

The Court: Are there any instructions that either the [437] Government or the defense wishes the court to examine?

Mr. Strong: I have them upstairs, your Honor. I did not expect the trial to end so soon. I have a complete set of instructions upstairs.

The Court: Mr. McLaughlin?

Mr. McLaughlin: I have some here, your Honor, and I have some more. I had no idea this case was going to end today.

The Court: I did not, either.

Mr. McLaughlin: And I have some at my office and I have some here.

Your Honor, before this case is submitted, there are some motions and I don't care to argue them, but I want to renew the same motions.

The Court: I want to examine the suggested instructions carefully and I am starting another case tomorrow afternoon at two o'clock. I cannot give all the morning to the examination of instructions.

Mr. Strong: I can bring mine tonight, your Honor. I haven't them here.

The Court: How long a time, gentlemen, do you want to argue the case?

Mr. Strong: It will take me less than an hour.

The Court: Mr. McLaughlin?

Mr. McLaughlin: Well, I can finish mine in an hour.  
[438]

The Court: That is two hours.

Mr. Strong: And then about 15 more minutes for the closing.

The Court: An hour and 15 minutes?

Mr. Strong: Altogether, yes, maybe even less.

The Court: That is two hours and a half. That runs up into the afternoon, and then an hour for the instructions to the jury.

Mr. Strong: Well, that was a very conservative estimate, giving myself that outside time. I probably would not speak that long at all.

The Court: I always want to give attorneys ample opportunity to present their arguments to the jury, because it is important that they be thoroughly presented.

Mr. McLaughlin: I would like to request your Honor to postpone the matter until Tuesday of next week.

The Court: Oh, no; I could not possibly do that. The jury would forget all about it and I would forget most of the facts, too.

Mr. Strong: I think, if defense counsel will only take an hour, we can probably get ours together in an hour so that we won't take too much time.

(The court admonished the jury and excused the jury until 9:30 o'clock a.m., the following day, Friday, June 21, 1946.) [439]

Mr. McLaughlin: Does your Honor want to hear those motions now?

The Court: Yes.

(The jury retired from the courtroom.)

The Court: Mr. McLaughlin, if you will come over nearer the reporter?

Mr. McLaughlin: Your Honor, I desire to renew each of the motions for acquittal that I heretofore made at the close of the Government's case, on each of the grounds stated therein and as to each of the defendants that I mentioned in those motions.

And I also desire to renew my motions to strike the evidence which I made at that time, and which I have heretofore made during this trial, on the same grounds stated at those times. And I think that covers all the motions, your Honor.

The Court: It will be understood that the defense counsel, without repeating verbatim the motions that were heretofore made,—it will be understood that they have all been renewed at this time by the counsel for the defendants. So understood by the court and by the Government?

Mr. Strong: So stipulated.

Mr. McLaughlin: Your Honor, before we adjourn, I want to say this: This question of law that I argued just after the lunch hour is a question of law which I think will [440] permeate this entire case. And I am going to be very candid with your Honor. Personally, I think that

it is good; your Honor thinks that it is not. I have relied upon that in this case, and I would like at some time or another—but I am not urging it if your Honor is fully satisfied with the position—but I would like to request a reconsideration of that point, because I am not sure from the comments that your Honor made at the rulings that your Honor fully comprehends or understands the point that I tried to make regarding that evidence. And I just make that request, and I make it subject to whatever disposition your Honor wants to make.

The Court: I am quite familiar with it and I have been through the matter before, Mr. McLaughlin; so I am quite satisfied with that ruling, because whenever I find a point that I am not fully conversant with, I stop right there and request either an oral argument or a brief submitted.

Let the record show the motions made by the defense are overruled, an exception is allowed to each and every one of them.

Mr. McLaughlin: Thank you, your Honor.

The Court: 9:30 tomorrow morning.

(Whereupon, a recess was taken until 9:30 o'clock a.m., Friday, June 21, 1946.)

[Endorsed]: Filed Jul. 1, 1946. [441]

[GOVERNMENT'S EXHIBIT NO. 50]

[For identification only; not received in evidence]

SWORN STATEMENT OF MR. WILLIAM A. SHUBIN GIVEN IN THE OFFICE OF THE INTELLIGENCE UNIT, BUREAU OF INTERNAL REVENUE, ROOM 844, U. S. POST OFFICE AND COURT HOUSE, LOS ANGELES, CALIFORNIA, JULY 24, 1945

Present:

Donald O. Bircher, Special Agent  
Samual J. Phoebus, Special Agent  
Walter E. Schlick, Special Agent  
Joseph D. Brady, Attorney for taxpayer  
Stanley C. Anderson, Attorney for taxpayer  
Gladys M. Callaway, Stenographer

(Questions propounded by Mr. Bircher unless otherwise indicated)

Q. Mr. Shubin, you are here today ready and willing to give a sworn, voluntary statement relative to your income tax liability for the years 1942 and subsequent thereto; is that correct?      A. Yes, sir.

Q. Your representatives here, Mr. Anderson and Mr. Brady, are your tax representatives in this matter; is that correct?      A. Yes, they are.

Q. Will you raise your right hand and be sworn? Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth in this examination, so help you God?      A. I do.

Q. For the record will you state your name and present address?

(Government's Exhibit No. 50)

A. William A. Shubin, 4551 Brompton Avenue, Bell, California.

Q. You are advised, Mr. Shubin, that any statement you make at this hearing or conference or any documents produced may be used by the Government in any subsequent proceeding; and that you have the right to refuse to answer any question that you feel might tend to incriminate you. Do you understand that or do you wish your attorney to explain it to you?

A. I believe I understand that. You mean any answers that I think might incriminate me, I should not answer.

Q. Yes, based upon the advice of your counsel.

(Mr. Brady): I think he is laboring under a misapprehension when he raised the question that he should not answer. I think that shouldn't be. His choice, I think, is that he will answer any question that you ask him. I think he has the understanding that he has the right to refuse to answer.

A. Yes, that's right.

W.A.S.

(Mr. Bircher): That's right. He has the right to refuse to answer if he believes such answers might tend to incriminate him. Do you want to give him any more advice, Mr. Brady?

(Mr. Brady): No.

(Mr. Bircher): For the record, and before we start to question Mr. Shubin, do you care to make any statement for the record, Mr. Brady or Mr. Anderson, as to the basis for bringing him here this morning and as to what you propose to do?



(Government's Exhibit No. 50)

(Mr. Brady): I didn't expect that I would be allowed to make such a statement, but I would like to make a statement and I would like Mr. Anderson to supplement it as to details:

Under date of June 29, 1945, I signed for our firm a letter addressed to the Collector of Internal Revenue, Washington, 25, D. C., transmitting certain returns and amended returns of the Vernon Hotel & Restaurant Supply Company, a partnership, and of the persons who were the members of that partnership from and after November 16, 1942, and of the wives of such persons. That letter outlines in general the circumstances under which the Shubins and Mr. Kissel came to our office seeking our advice, and further outlines what advice we gave them and what was done pursuant to that advice. I would like to incorporate that letter as a part of my statement here. I might say that I would not have accepted employment in this matter had I not felt certain from the outset that the filing of the original returns, though concededly those returns understated the amount of income and tax, was not an attempt to evade tax. I don't want to go into the details as to the basis for that conclusion. I merely want to state it as I think the Bureau officials would prefer for Mr. Shubin, Mr. Shubin's brother and Mr. Kissel to make their own statements which, I think, will lead to the conclusion that they did not attempt to evade any tax.

(Mr. Bircher): Very well then, we will incorporate your letter of June 29, 1945, as part of your statement here.

(Government's Exhibit No. 50)

“BRADY & NOSSAMAN

Counselors at Law

433 South Spring Street

Los Angeles 13

June 29, 1945

Commissioner of Internal Revenue

Washington 25, D. C.

Sir :

Enclosed are certain returns and amended returns of Vernon Hotel & Restaurant Supply Co., of 3301 East Vernon Avenue, Los Angeles 11, California, a partnership, of the persons who were members of the partnership from

W.A.S.

and after November 16, 1942, and of the wives of such persons.

In 1940 William A. Shubin and J. D. Johnson formed a partnership known as Vernon Hotel & Restaurant Supply Co. This partnership was terminated and dissolved on November 14, 1942. Johnson sold, transferred, and assigned his interest in the assets of the dissolved partnership to Frederic Alexander Shubin and Jack L. Kissel. On November 16, 1942, William A. Shubin, Frederic Alexander Shubin, and Jack L. Kissel entered into an oral partnership agreement and have at all times since that date been doing business as partners under the name of the prior partnership, Vernon Hotel & Restaurant Supply Co. By their oral partnership agreement they agreed to share profits and losses equally.

The prior partnership (which consisted of Johnson and William A. Shubin and which was dissolved on Novem-

(Government's Exhibit No. 50)

ber 14, 1942) erroneously filed a partnership return (Form 1065) covering the entire calendar year 1942, and the new partnership (which was formed on November 16, 1942) did not file a 1942 return. What the members of the new partnership then thought were the entire net profits of the partnership, in accordance with its books (\$1581.98), for the period from November 16 through December 31, 1942, was erroneously included in gross sales on the partnership's 1943 return (Form 1065). The errors set forth above are attributable to the fact that the partnership books were kept and its returns were prepared by persons unskilled in the keeping of books and the preparation of tax returns.

Throughout the calendar years 1942, 1943, and 1944, William A. Shubin was married to Julia T. Shubin. Jack L. Kissell was married to Jean T. Kissel, and Frederic Alexander Shubin was unmarried. William A. Shubin was married to Julia T. Shubin on August 20, 1929. His contribution to the partnership formed with Johnson in 1940 consisted of about \$36.00 in cash, all of which was the community property of Julia T. Shubin and himself. Jack L. Kissel was married to Jean T. Kissel on June 18, 1938. His contribution to the partnership formed with William A. Shubin and Frederic Alexander Shubin on November 16, 1942, consisted of property acquired from Johnson at a cost of about \$700.00. The \$700.00 which Jack L. Kissel used to buy such property from Johnson was the community property of Jean T. Kissel and himself. William A. Shubin and Julia T. Shubin, and Jack L. Kissel and Jean T. Kissel, have at all times since their respective marriages been residents of and domiciled in California.

(Government's Exhibit No. 50)

William A. Shubin filed separate returns for 1942, 1943 and 1944. Julia T. Shubin did not file returns for 1942 and 1943, for the reason that William A. Shubin's returns for those two years included all of his share of the earnings of the partnership for that year as shown by its books, and Julia T. Shubin had no other income. For 1944 William A. Shubin and Julia T. Shubin each filed a separate return. Each returned one-half of William A. Shubin's share of the partnership earnings as shown by its books.

W.A.S.

William A. Shubin erroneously reported on his return, however, one-third of the rent received from an apartment house acquired in March, 1944, in the proportions shown, by the following persons:

William A. and Julia T. Shubin	45%
Frederic Alexander Shubin	45%
Jack L. and Jean T. Kissel	10%

William A. Shubin and Julia T. Shubin should have each reported 22-1/2%.

Frederic Alexander Shubin erroneously reported on his 1944 return 1/3 of the rents from the apartment house, whereas he should have reported 45% thereof.

Jack L. Kissel erroneously reported on his 1944 return one-third of the income from the apartment house, whereas he and Jean T. Kissel should have each reported 5% thereof.

None of the persons claimed depreciation on the apartment house and its furnishings.

Jack L. Kissel and Jean T. Kissel filed a joint return for 1942. Jack L. Kissel filed separate returns for 1943

(Government's Exhibit No. 50)

and 1944. Jean T. Kissel did not file a return for 1943, for the reason that Jack L. Kissel's 1943 return included all of his share of the earnings of the partnership for that year as shown by its books, and Jean T. Kissel had no other income. Jean T. Kissel filed a separate return for 1944.

On the partnership returns originally filed for the years 1942, 1943, and 1944 there was deducted from each partner's share of the partnership earnings 20% thereof as an earned income credit. In other words, only 80% of a partner's share of the earnings was reported on his individual return (or the individual returns of himself and his wife, or their joint returns). This error is attributable to the inexperience and lack of knowledge of the person whom the partners employed to prepare the returns and who they reasonably believed was competent. The partnership returns as originally filed also contain other more minor errors.

The enclosed returns and amended returns reflect partnership earnings not previously returned and for the most part not shown on its books as follows:

<u>Period of Year</u>	<u>Amount</u>
November 16, through December 31,	
1942	\$ 4,158.02
1943	72,419.39
1944	64,547.59
	<hr/>
Total	\$141,125.00

W.A.S.

(Government's Exhibit No. 50)

We are advised by a certified public account (whom the partnership recently engaged at our request to compile data on which to base the returns enclosed herewith) that none of the partnership income not previously returned appeared as income on the partnership books. The partners have considerable knowledge of the commodity in which they deal, but are, in our opinion, almost completely unformed about accounting, the keeping of books, and the preparation of income tax returns. The person they engaged in 1943 to unsnarl the mistakes of a prior bookkeeper and to prepare their tax returns knew, we fear, not much more about such matters than the partners themselves, as illustrated by his inclusion on the individual returns of only 80% of the partnership earnings, his failure, prior to 1944, to prepare separate returns for husband and wife, his improper allocation of the income from the apartment house, and his failure to deduct depreciation thereon. To a considerable degree it was a case of the blind leading the blind. The foregoing is not intended, however, serious as the errors mentioned were, to attempt to convey the impression that the failure of the partners to return the full amount of the income of the partnership was inadvertent; such was not the case.

The enclosed returns and amended returns are filed voluntarily. No audit by a Revenue Agent of the returns of the partners and their wives for the years in question has been made or (so far as they know) proposed. They consulted and retained us on May 14, 1945, asking that we prepare the returns which are now enclosed. The partnership books and records were in such unsatisfactory conditions that we required that a certified public account-



(Government's Exhibit No. 50)

ant be engaged to compile the data required for the returns. In accordance with our request the partners engaged Mr. Henry J. Rausch, a highly reputable certified public accountant of 318 West Ninth Street, Los Angeles 15, California, on May 28, 1945. Mr. Rausch completed his work in this connection on June 25, 1945. Attached hereto is a letter dated June 27, 1945, from Mr. Rausch to us regarding the method he used in carrying out the assignment we gave him.

At no time since May 14 have the partners and their wives deviated from their intention and desire to return correctly their entire income for the years involved. The delay from May 14 to the present is attributable solely to the fact that such period was required for compilation of the required data and preparation of the rather large number of returns. As a matter of fact, the determination of the partners to file amended returns was arrived at much earlier than May 14, but for a considerable time they were at a loss as to how to proceed in the matter.

This letter and the enclosed return are forwarded to you instead of directly to the Collector at Los Angeles (Sixth California District) in accordance with the suggestion of Mr. Timothy C. Mooney, of 1100 Bowen Building, 821 - 15th Street, N. W., Washington 5, D. C., who at our request conferred with Mr. Norman S. Cann, Deputy Commission, about the matter,

W.A.S.

on May 16, 1945, without, however, disclosing the names of the taxpayers involved.

There exist facts which, in our opinion, justify imposing no penalty under sections 291(2) and 293, Internal



(Government's Exhibit No. 50)

Revenue Code. We are convinced that the failure of the partners and their wives to return their full income for the years in question was not motivated by any intent to evade taxes. The attendant facts and circumstances will be fully disclosed to the Revenue Agent assigned to audit the returns.

Enclosed are returns and checks as follows:

<u>Partnership Returns</u>	<u>Total Net Income</u>
1942 Amended (January 1 to November 14) for J. D. Johnson and William A. Shubin	\$ 6,468.51
1942 Original (November 16 through December 31) for Vernon Hotel & Restaurant Supply Co.	7,892.50
1943 Amended	113,453.15
1944 Amended	124,231.96

<u>Individual Returns</u>			
	<u>Amt. of Tax Due</u>	<u>Interest to 7-2-45</u>	<u>Total</u>
<u>William A. Shubin</u>			
1942 (amended) \$347.31	\$ .00	\$	
1943     "	4,074.10	316.63	
1944     "	4,398.98	77.81	
	<hr/>	<hr/>	
	8,473.08	394.44	\$ 8,867.52
<u>Julia T. Shubin</u>			
1942 (original) \$347.31	.00		
1943     "	6,691.00	520.53	
1944 (amended)	4,367.85	77.73	
	<hr/>	<hr/>	
	11,058.85	598.26	11,657.11
W.A.S.			

(Government's Exhibit No. 50)

## Individual Returns

	<u>Amt. of Tax Due</u>	<u>Interest to 7-2-45</u>	<u>Total</u>
<u>Frederic Alexander Shubin</u>			
1942 (amended) \$919.65	.00		
1943       “	16,071.96	\$1,250.12	
1944       “	11,724.72	208.63	
	<hr/>	<hr/>	
	27,796.68	1,458.76	\$29,255.44
<u>Jack L. Kissel</u>			
1942 (amended) joint with wife \$536.18	.00		
1943 (amended)	4,065.74	316.29	
1944       “	4,160.14	74.30	
	<hr/>	<hr/>	
	8,225.88	390.59	8,616.47
<u>Jean T. Kissel</u>			
1942 (amended) joint with husband	.00		
1943 (original)	6,835.20	533.30	
1944 (amended)	4,475.06	79.63	
	<hr/>	<hr/>	
	11,330.26	612.93	11,943.19

Also enclosed are powers of attorney dated June 29, 1945, signed by the following:

William A. Shubin

Julia T. Shubin

Frederic Alexander Shubin

Jack L. Kissel

Jean T. Kissel

Respectfully,

For Brady & Nossaman”

(Government's Exhibit No. 50)

Q. Mr. Shubin, have you just received and read over the letter signed by Henry J. Rausch, Certified Public Accountant, dated June 27, 1945, addressed  
W.A.S.

to Messrs. Brady & Nossaman, with reference to Mr. Rausch's examination of the income tax liability of the partnership known as Vernon Hotel & Restaurant Supply Company and of the individual income tax returns of the partners for the year 1942 and subsequent thereto?

A. Yes, sir, I have.

Q. Are all of the statements and representations in that letter true and correct to the best of your knowledge and belief?

A. Yes, sir, they are.

Q. Then I believe it will shorten this record if we incorporate that letter as a part of your statement, if it is agreeable with you gentlemen, Mr. Brady and Mr. Anderson.

Mr. Brady: That is agreeable.

"HENRY J. RAUSCH

Certified Public Accountant

Tax Counsellor

707 Insurance Exchange Bldg.

Los Angeles

June 27, 1945

Messrs. Brady & Nossaman

433 South Spring Street

Los Angeles 13, California

Gentlemen:

At your request I am stating (1) the instructions which you gave me with reference to an investigation of

(Government's Exhibit No. 50)

Vernon Hotel & Restaurant Supply Co., a partnership, 3301 East Vernon Avenue, Los Angeles 11, California, and (2) the methods which I used in carrying out the assignment.

On April 25, 1945, you informed me of the general nature of the assignment, and asked me to call at your office on April 28 to discuss the matter in detail with you and your clients and to receive your instructions.

At our conference on April 28 you instructed me to make as thorough an investigation as possible to ascertain all partnership income not reported on the partnership federal and state income tax returns for the calendar years 1942, 1943 and 1944. You advised me that in your opinion the members of the partnership sincerely desired to disclose and return (by means of amended returns) every penny of income not previously reported, but that they did not understand accounting very well, and that their books and  
W.A.S.

records had been kept by inexperienced persons. You most emphatically enjoined me to spare no effort to ascertain the full amount of unreported income. At the conference your clients approved your instructions to me, and agreed to cooperate with me to the fullest extent.

On the afternoon of April 28 I visited the partnership's place of business and began my examination of the partnership books and records and of the personal accounts and records of the three partners. I returned on subsequent days to complete my examination, and personally devoted to a total of sixty hours to the matter and had a staff accountant assist me for twenty four and one-half hours.

(Government's Exhibit No. 50)

In making my examination, I did not make a detailed audit of all of the transactions of the partnership but I examined such accounts in the general ledger and postings in the cash book and journal as I believed would disclose any amounts of income not previously reported. I also examined the personal bank accounts of the three partners. (The partners informed me that their wives had no separate bank accounts.) Deposits credited to their accounts which were found to be income not previously reported have been included in income in the amended returns. Further, I obtained a list of personal expenditures by the three partners from funds which I considered to be additional income, and such amounts have also been included in the amended returns. Lastly, the cash on hand, not recorded in any of the records, has also been included in income in the amended returns.

The attached statement for the period from November 16, 1942 to December 31, 1944, shows a total income of \$245,577.61, which, in my opinion, is the amount of income that should have been reported on the tax returns. That amount is being reported in the amended returns.

The original returns showed income for 1943 of \$41,033.76 and for 1944 of \$63,418.85, or a total of \$104,452.61. The present partnership, which was formed on November 16, 1942, did not file a return for the period from November 16 through December 31, 1942. Deduction of the reported income of \$104,452.61 from the total income of \$245,577.61 leaves income of \$141,125.00 not previously returned. This amount I have allocated as follows on the basis of my investigation and information furnished to me by the partners:

(Government's Exhibit No. 50)

<u>Period of year</u>	<u>Amount</u>
November 16 through December 31, 1942	\$ 4,158.02
Calendar Year 1943	72,419.39
Calendar Year 1944	64,547.59
	<hr/>
Total	\$141,125.00
	<hr/> <hr/>

The following items will reconcile the difference between the latter amount of \$141,125.00 and \$141,966.98 shown on the attached statement:

W.A.S.

(1) Withdrawals of \$740.00 by two of the partners, in 1942, were charged against salaries on the records. This amount has now been eliminated from expense.

(2) The original return for the year 1943 included an amount of \$1,581.98 which is attributable to the period from November 16 through December 31, 1942. That amount has been eliminated from the 1943 return and included in the return for the earlier period mentioned.

Throughout my investigation the partners and their employees cooperated with me wholeheartedly and were, in my opinion, completely frank in their disclosures to me. They made fully available to me all of their partnership and personal books and records.

The nature of the matter is such that I am unable, as you will understand, formally to certify that the amounts shown on the amended returns are accurate to the last cent. In the case of any doubtful items, however, I have

(Government's Exhibit No. 50)

resolved the doubt against the partnership and the members thereof. I am satisfied in my own mind that the amended returns are, in all significant respects, accurate and complete.

Very truly yours,

(s) Henry J. Rausch"

Q. From the statements made in the letter of Henry J. Rausch, Certified Public Account, which you have just reviewed, Mr. Shubin, it is apparent that you and your partners and the Vernon Hotel & Restaurant Supply Company, a partnership, received considerable unreported income during the period from November 16, 1942 to the end of the calendar year 1944, totaling a sum of \$141,125.00. Please tell us, if you will, the source of that income?

A. Well, that was an overcharge on meat we sold.

Q. By "overcharge" you mean . . .

A. Above the ceiling price.

Q. You mean by "ceiling price" the stipulated price set by the OPA? A. That's right.

Q. How were these overcharges usually collected from your customers? A. As cash.

Q. In other words, when you sold meat to your customers you billed your meat at the regular ceiling prices by invoices and made collections in cash on the side as overcharges? A. Yes, that's right.

W.A.S.

Q. Do you know whether that was quite a common occurrence during that period of time in the meat business?



(Government's Exhibit No. 50)

A. Well, I couldn't say because what was going on among others, I didn't know. We were running our own business trying to keep our side up—that was the only way to stay in business and we had to collect money on the side.

Q. Did you and your firm do your own slaughtering?

A. No, sir, we didn't do our own slaughtering except in one instance we did have someone kill hogs for us—they bought them and we paid them for the hogs and they killed them. In two or three other instances beef was handled the same way. W.A.S.

Q. The California Meat Supply Company did your slaughtering for you, did they not?

A. They didn't do our slaughtering. They slaughtered beef but they didn't slaughter for us.

Q. Did you or your partners own any cattle?

A. No, we didn't—~~live carcass beef~~, except in several (three or four) instances mentioned in answer to the second preceding question. W.A.S.

Q. Then you did not have to have your own cattle slaughtered and pay overcharges which a number of other companies did where they had their own cattle?

A. No, sir, we never paid any overcharges.

Q. How did you base your sales price on meat that you sold during 1942 to 1944, inclusive?

A. The way we based that is: We were operating as a restaurant supply house or a wholesale house and the OPA gave us a choice there of either going into the restaurant end of it or the wholesale end of it. Whenever the packing house sold hogs they sold them to the retailer but, according to OPA set-up, they had to sell

at  $1\frac{1}{2}\text{¢}$  or  $2\text{¢}$  lower than they could sell it to the jobber. So naturally we had the packer on the spot because selling us they were getting  $2\text{¢}$  or  $1\frac{1}{2}\text{¢}$  a pound between market and the jobber, which we were called as processors, but we couldn't, in turn, sell this whole hog carcass to the market. To do that, we had to sell at  $1\frac{1}{2}\text{¢}$  to  $2\text{¢}$  below ceiling price, so the only way we could sell that hog was to cut it up into fabricated cuts. After we break it up into fabricated cuts the OPA gives a certain price to sell this cut for. One thing they failed to do was to give us a fluctuation on different items. We will say "back fat"—it was  $15\frac{1}{2}\text{¢}$  that the OPA based the price on to make us \$1.50 per cwt. on. At that time we had to process the back fat, make pure lard of it, and sell it as pure lard which gave us a 25% shrink to process that real lard and we, in turn, sold it to a house like Proctor & Gamble at  $12\text{¢}$  a pound, which gave us a loss of 4, 5 or  $6\text{¢}$  a pound.

Q. Mr. Shubin, please tell us who collected the overcharges, which were not recorded on your invoices, from your customers?

A. I collected them except in a very few instances when my partners collected them. W.A.S.

Q. What was the usual procedure followed—were the charges that were billed and

W.A.S.

shown on the invoices usually paid by your customers by check and the overcharges by cash?

A. They did pay by cash and check and some all of them by cash.

Q. Who determined the amount of the overcharges to be assessed?

(Government's Exhibit No. 50)

A. Well, they left it up to me to charge the overage.

Q. How did you usually figure out and arrive at the overcharges?

A. Well, the way I charged—if I thought that we can charge less and come out on it—if we were getting a higher price on an item—I mean if the market happened to change and we were getting our right charge on the lard, then naturally our extra charges were small. All we wanted was a fair margin of profit.

Q. Were all your customers charged the same overcharges at the same periods?

A. No, sir, they weren't.

Q. In other words, you usually based your overcharges, I presume, on whatever you thought the market would stand—some of your customers were shown some preference over others at times?

A. Yes, they were.

Q. Who were your principal customers who purchased meats from you and who made these overpayments to you?

A. Well, I can't recollect who the principal customers were—they were so many of them. Many times I wouldn't charge half of them—some of them I would and some I wouldn't.

Q. Can't you name three or four of your biggest accounts?

A. I would have to check the records—it has been so long back.

Q. What record did you keep of the overcharges received?

A. I didn't keep any record except for the first month or two, when we started making overcharges, I would

(Government's Exhibit No. 50)

keep a memorandum of the overcharge for a day or two in those few cases where the customer did not pay on delivery. When such customers paid up (always in a day or two), I would obliterate the customer's name, and when all the customers listed on that page had paid up, I would tear out that page and throw it away. After the first month or two, I had educated all the customers to see to it themselves that they paid the overcharges promptly without any urging from me, which they would do as they wanted to be able to buy more beef.

Q. Did you keep any pocket memorandum showing total collections on overcharges at any time?

A. No, sir, I didn't.

Q. Did you make notations on your invoices showing the overcharges per pound that you made?

A. No, sir, I didn't.

W.A.S.

Q. Were any of your associates or partners or office employees familiar with your actual overcharges?

A. No, I can say that the ones that worked in the office didn't know a thing about it. My partners did know at times, but they were so busy on the other end that they left everything to me.

Q. Were you the partner who designated which customer should receive meat and have (see next page)

W.A.S.

their orders filled?

A. No, sir, we didn't play any favorites.

Q. But you did play favorites as to the amount of overcharges.

(Government's Exhibit No. 50)

A. I didn't play favorites as to the amount of overcharges—I would charge some less and some more, but it was just a matter of charging what I thought was right.

Q. Is it correct to understand from your statement that, for a given period, you charged one customer a certain amount of overcharge and for the same period charged a greater amount to some other customer or customers?

A. Yes, sir, it has fluctuated but that isn't because of favoring one better than the other—we just charged to be charging.

Q. How would you base your overcharges upon repeated orders? Would you trust to your memory as to what you overcharged them on previous sales?

A. No, I collected right there and then as the sale was made.

Q. When the customer returned and made another purchase, how would you base the new overcharge? Would you trust to your memory?

A. Yes, and many times I got fumbled up and was told that I charged less the time before.

Q. What did you do with these funds you collected from overcharges? A. Just put them away.

Q. Where did you put them when you first collected these sums—what was your daily practice?

A. I kept them in my pocket or had a place in the office in a box, or whatever it may be.

Q. Then what did you do with the funds?

A. Well, I would take them home and put them away.

(Government's Exhibit No. 50)

Q. When did you count the funds? What was your usual practice?

A. Well, many times I didn't count the funds for two or three months—just kept it put away. That money I didn't want to touch—I didn't have occasion to get into it and count it.

Q. Did you make any account or statement to your partners as to the amount of your overcharges?

A. Yes, I did. They knew I was overcharging—they knew I had the money. They would ask me, "How do we stand?" and many times I would answer them, "Well, when I get to it, I will check it up and see how we stand."

Q. Your partners had then to trust to you to make some accounting and distribution of these funds which resulted from overcharging? Your partners had no way to  
W.A.S.

check on their earnings from overcharges—they had to depend upon you to distribute them; is that correct?

A. I didn't distribute the money. I had the money always.

Q. Do you still have the total funds which you collected from overcharges?

A. No, sir, they were turned in.

Q. You don't have all those funds together in some depository at this time?

A. No, they were turned in on the tax.

Q. You mean then that when you recently prepared and filed amended income tax returns for the partnership and for yourself and your partners that you then went to this depository and drew out some of the funds and paid some of those funds on the tax?

(Government's Exhibit No. 50)

A. When you say, "some of the funds"—everything I had was turned over through Henry Rausch. I showed him every penny I had and we used it up since then.

Q. How much approximately did you have in April or May 1945 when you examined this fund in this depository you had? A. In cash?

Q. Yes. A. I can't answer that now.

Q. Was it in excess of \$100,000.00?

A. No, sir, noways near that.

Q. According to this letter on the stationery of Henry J. Rausch, dated June 27, 1945, the total understatement of income for the period from November 16, 1942 to December 31, 1944, was \$141,125.00. You didn't have that large a sum on hand when you recently made your examination? A. No, sir.

Q. Some of the funds represented by that total had been deposited in your individual bank accounts, I presume? A. Yes, sir.

Q. Had you used some of those funds for your personal living expenses or investments?

A. Yes, we had. When I say that some of the funds were used, I kept all the money at home, then—I mean the money they wanted to use for the business—I kept track of all that. If he wanted to spend some money or my brother wanted to spend some money, I gave them some, and that's the money in their personal accounts.

Q. In other words, you say if your brother wanted some money for some purpose, you would give him the cash and he would have it entered in the books as a new contribution to capital in the business and he would withdraw it for his personal use. Is that correct?

W.A.S.



(Government's Exhibit No. 50)

A. They deposited it in their personal accounts and they spent it through those accounts. There were times that they would spend it when they didn't put it in their personal accounts. They can tell you that better than I can.

Q. Did you make every effort to give all information in your possession to your accountants and attorneys when you got around to filing amended returns?

A. My first bookkeeper, who prepared my original income tax returns and those for the partnership, I did not advise of our receipt of overcharges. However, when Henry J. Rausch recently audited our records and accounts, I made every effort to fully inform him of all the items of income we had received.

Q. Mr. Shubin, do you have any records, or independent recollection, at this time from which you could determine your actual receipts from overcharges during this period, November 16, 1942 until the end of December 1944?

A. No, sir, I have no records, but going over with Mr. Rausch those records and information were given to the best of my recollection and ability.

Q. Mr. Shubin, when your bookkeeper originally prepared the income tax returns for the partnership and for yourself, as an individual, why didn't you tell him of your receipt of additional income in the form of overcharges which you have now disclosed?

A. Well, we didn't want others to know we were running a black market and selling on overcharge.

Q. You wouldn't hesitate to let your own bookkeeper know of it, would you?

A. Yes, I even kept my wife from knowing it.

(Government's Exhibit No. 50)

Q. Yet all your customers knew about it?

A. The customers did—they bought from me—they naturally knew.

Q. Did you have any customers you didn't make overcharges to?      A. Yes, I did.

Q. Why didn't you make overcharges to all of them?

A. Because we were looking to the future on business. We weren't there to rob everybody because we figured the business in the future is worth more to us than at the present.

Q. Did your bookkeeper participate in the division of spoils and benefit in any way?

A. He didn't know anything about the overcharges.

Q. Why didn't you tell him about it?

A. I didn't think it was his business to know.

Q. Why didn't you report your total income in your Federal income tax returns that you filed?

A. The reason why I didn't report is the OPA has a law that charges a triple damage

W.A.S.

on the moneys that are collected over the ceiling price and I was afraid that if I did turn it in at that time that all the OPA had to do was to step in and close our doors, which they have authority to do if they find these things are going on.

Q. When you filed your partnership returns for 1942, 1943 and 1944, and your individual income tax returns for those same years, didn't you know that such returns did not reflect all your income?

A. Yes, sir, I did.

(Government's Exhibit No. 50)

Q. And you say the reason you didn't put all your income in was that you were apprehensive that some other governmental agency might learn about it if you reported in excess of what your records showed?

A. That's right.

Q. What occasioned your filing amended returns on July 2, 1945?

A. Well, you see we wanted to make amended returns—not amended returns—I wanted to make returns for the total amount for the last two or two and a half years—in fact since the time we started collecting this extra money. In fact, I even sought legal advice on it and suggested to my attorney that I had some money I would like to turn in and I was afraid to turn it into Internal Revenue because if the OPA ever found it out, I would be out of business tomorrow. I suggested that maybe I should turn it in as gambling winnings. He said I should turn it in but unless you can find the right way, you shouldn't turn it in because you didn't earn it in gambling. He said, "If you want to I will see to it, but you will have to find a right way to turn it in."

Q. Just answer the question, please. What was the motivating reason which caused you to file amended returns?

A. By these discussions with attorneys,—I finally run into—I was with him for a year, Mr. Grossman. I was talking to him one morning and I said, "Henry, if I could properly turn the money in that I had as overcharges, I would do it tomorrow if I knew the OPA would not close my doors and the Internal Revenue don't go to OPA and show what I turn in." He said, "Do you mean it?",

(Government's Exhibit No. 50)

and I said, "Yes, I have tried for two years, since I have been collecting, but I don't know of any way that I can turn it in and yet be safe from OPA." He said he thought he knew someone that can answer that question for me. He left on his vacation for about ten days or so and when he came back he took me over to Mr. Brady's office and that's how I happened to turn it in.

Q. Mr. Shubin, did you know when you first contacted Mr. Brady, or his office, on or about April 25, 1945, that Government agents had started to check your associates and tenants in the building you occupied in a black market investigation to determine whether they had received income from black market operations?

A. The OPA has been at my place and checked my books and gave me a clear bill prior to that. That's the thing I know.

Q. My question, Mr. Shubin, is this: When you first went to Mr. Brady's office on

W.A.S.

or about April 25, 1945, did you then know that internal revenue agents had been checking other tenants of the same building that you have occupied in an effort to determine whether they—the other tenants—had been engaged in black market operations and had received unreported income?

A. No, I did not know, but I am informed that the date should be May 14, 1945, not April 25, 1945. W.A.S.

Q. Do you know Charles King?

A. Yes, sir, I do.

(Government's Exhibit No. 50)

Q. He is connected with the California Meat Supply Company in the same building where you are a tenant; is that correct?

A. Yes, but the name of Mr. King's company is Southern California Meat Co. W.A.S.

Q. Did you know Hyman Stillman?

A. Yes, I have known him since he has been in that building.

Q. Did either of those gentlemen advise you that they had been contacted with reference to any unreported profits from black market operations that they had information about prior to the time you contacted Mr. Brady?

A. No, sir.

Q. Did either of those gentlemen or their associates or employees advise you that an income tax investigation was under way pertaining to tenants of the building?

A. No, sir, they did not.

Q. Then it is your statement that, based on Mr. Grossman's advice, you followed through with your endeavor and your intention to file amended returns and did, independently, contact Mr. Brady through him?

A. Yes, sir, I did.

Q. Going back to these overcharges, what was the customary method by which the customer paid you these excess amounts which were paid in excess of the invoice price for the meat?

A. They gave it to me as cash.

Q. Where was it usually given to you?

A. Either we went to the back room or on the side in the cooler—different ways where the others couldn't see it.

(Government's Exhibit No. 50)

Q. Did you usually wear one of those long, white aprons with big pockets? A. Yes.

Q. Was that a way of collecting by the customer depositing the money in the pockets?

A. No, not necessarily. I didn't keep it in the apron pockets, no, sir.

Q. Did you keep any record of these overcharges by week or by month? A. No, sir, I did not.

W.A.S.

Q. You kept some of the funds in the office for periods of time—a week or month?

A. Sometimes three or four days then I would just take it home in a chunk—maybe in an envelope—maybe I didn't open the envelope for four months.

Q. Did you ever accept checks in payment of overcharges?

A. No, sir, I don't recall accepting checks.

Q. Did you demand cash? A. Yes, sir.

Q. Were the overcharges paid to you in lump sums or so many dollars and so many cents, or just how?

A. So many dollars and so many cents—whatever the overcharges were they gave it to me.

Q. How did you compute your overcharges—so much a pound or so much a cut?

A. Yes, at times yes, and sometimes no. When they bought the merchandise I would just tell them, "You owe me so much," and they would give me what I asked.

Q. Did you make any effort to collect the overcharges in any particular denomination of bills—large bills?

A. No, sir, I did not.

(Government's Exhibit No. 50)

Q. When you filed these amended returns then and had your accountant make his examination recently, did you allow him to make a physical inventory of your assets—did he count the bills?

A. No, sir, I counted and told him.

Q. Then did you turn in this roll of bills or volume of currency—did you convert it into cashier's checks or make deposits?

A. I made deposits of it in our business.

Q. Then if any of the funds were embezzled or misappropriated during the time they remained in your office, you wouldn't know it and such funds wouldn't have been reported?

A. No, I had my fingers on it—no one knew where it was.

Q. Then you are satisfied that the totals you have reported on the amended returns are the correct totals of previously unreported income; is that correct?

A. Yes, sir.

(Mr. Phoebus questioning)

Q. In your original partnership agreement between you and your brother and Mr. Kissel, what agreement did you have as to the division of profits?

A. 33 1/3, 33 1/3 and 33 1/3.

W.A.S.

Q. Did Mr. Kissel invest quite a substantial amount of money in the business?

A. Well, when we went into the business, I don't think the business was worth over \$3,000.00.

Q. Did Mr. Kissel invest \$1,000.00 of that?



(Government's Exhibit No. 50)

A. What the arrangement was the books will show what he invested.

Q. Did he bring with him any great experience or skill in the meat industry?

A. He worked for me for almost eight months with the idea that he will go into business with me as soon as the opportunity came up.

Q. Is he related to you?

A. Yes, my brother-in-law—married to my wife's sister. It's my wife's brother-in-law.

Q. Was there every any discussion of a different ratio of dividing profits?

A. We thought we would make it on a different ratio. When we went into partnership, I wanted to hold 51% of the business. They argued the fact that what can I do that I should hold the value of 51% because they were young—my brother was younger than me and they knew one thing that kept this business going was the employees. We worked from four in the morning until eight or nine o'clock at night. They argued that if it wasn't three ways it wasn't fair, so we agreed to that. It wasn't the money involved because the company didn't have much money to start the business.

Q. What did Mr. Kissel do before he worked for you during this eight month period?

A. He was with Dr. Pepper Bottling Works.

Q. In regard to the price you paid for meat to packers from whom you bought, was all your meat bought in strict accordance with OPA prices?

A. Yes.

Q. You never paid anything on the side in cash?

A. No, we were in no position to have to pay.

(Government's Exhibit No. 50)

Q. Meat was at a premium, witness the fact that you were able to obtain extra charges from your customers. Why didn't you have to pay it, in turn, to persons from whom you got meat?

A. We put the packers on the spot by going into the type of business they didn't want to go into—fabricating and cutting. At the present time we bone 130,000 pounds of Government boneless beef, which we run second to Cudahy and at times more than their production per week. The packer is in no position to bone beef and say if he doesn't bone beef the OPA says they cannot kill it, so the packers look to us to bone their beef and we, in turn, demand civilian supply with it.

Q. This situation prevailed throughout 1943 and 1944?

A. Yes, we were cutting hogs then—the packers didn't want to. We were offered by

W.A.S.

a Mr. Callahan from Post Packing Company for two car-loads 2¢ below ceiling and I refused him.

Q. You gave us the information that you kept no books or records on these extra charges that you had made. However, in discussing the question of cash that you had given to your brother at various times you used the phrase, "I kept track of the money." How did you keep track?

A. They put the money in the bank—their personal accounts—and they bought items. They only asked me for money when they bought large items and I knew what they spent. I knew what he took.

(Government's Exhibit No. 50)

Q. The funds from these overcharges were used by the various partners and their wives to purchase the apartment house and not the partnership as a firm?

A. Yes, sir.

Q. Where did your wife, for example, understand the funds came from to purchase this apartment house?

A. She never questioned me where the funds came from to purchase the apartment house. We deposited the money into the company and, in turn, wrote checks to ourselves as a drawing and bought the apartment house.

Q. So it is true then that your wives did not know the origin of these funds?

A. No, they did not.

Q. You referred to the fact that from the beginning when you started to collect these overcharges you consulted your attorneys as to the manner and means of reporting this income. Do you care to disclose the names of these attorneys?

A. Yes, sir. Mr. Brady asked me if I can testify—if I can show someone or bring someone to show that I did discuss turning in these funds and I didn't at the time, but I went to my attorney and I told him what I have done and that I didn't tell Mr. Brady that he was the one—that we discussed this—and he felt insulted. He felt what he discussed with me was in no way incriminating. I discussed it with Mr. Del Valle of Arnerich, Del Valle & Sinatra.

Q. Is Mr. Grossman an attorney?

(Discussion off record.)

A. Yes, but has never practiced law as such, but I didn't know he was an attorney until just this moment. (Mr. Schlick questioning)

(Government's Exhibit No. 50)

Q. Mr. Shubin, when did you first hear that investigations by the Internal Revenue were in process along the boulevard down there?

A. Well, I can't answer that.

Q. Can you associate it with any event?

W.A.S.

A. I can't tell you the first date I heard they were around.

Q. Can you associate it with some event or happening or having seen somebody?

A. I haven't seen anyone. I saw you fellows walk in one day and Mr. Walsh was there—the OPA fellow—and I saw you walk in sort of important—you looked important—and I asked him, "Who are the people?" and I saw him wave at you, I think, and he said, "Just some fellows I know." That's the first time I saw you people. Then when you came back I remembered seeing you and I said, "Oh, yes, I saw you before," and I recollected I saw you before.

Q. My reason for my question was that when we first met you formally you said, "I know who you are—I have seen you before."

A. That's when this Walsh told me—I didn't know it until later and I said, "I know who you are."

(Mr. Bircher questioning)

Q. Mr. Shubin, was the date that you first saw these gentlemen before you went to Mr. Brady?

(Government's Exhibit No. 50)

A. That I really don't know. I can't recollect whether it was before or after. I didn't know who they were at the time and then I saw them come back at a later date. I know I had—I spoke to Mr. Grossman. At the time I first saw them, I didn't know who they were—I thought they were OPA officers. They were buzzing around and checking the books.

Q. Your amended returns had been mailed prior to the time the Internal Revenue representatives called on you formally; is that correct?

A. Yes, sir. I knew that Mr. Phoebus and Mr. Schlick were Internal Revenue representatives only a short time before they formally called on me about July 5, 1945.

Q. Do you have any other statements you care to make on the record, Mr. Shubin?

A. I can go through our records and find bills that I have made at times where I thought it was safe to put the money into the business as fictitious invoices—make a dummy invoice—and threw in maybe \$500.00 or \$1,000.00. In fact, many times when the money was laying in the office, I would take and make a fictitious invoice on things that didn't have any point value, such as pigs' feet or back fat. I would put as much money into the company as I thought it would be safe to, and at one time we ran a market for two months which we only made, I believe it was \$1,500.00 and I made a return on that market of \$12,000.00, which was really a ridiculous profit for the

(Government's Exhibit No. 50)

income, I know, was \$8,000.00 a year or so. I did that because I did want to return the money and every place I thought that it was safe and not have the OPA walk in and close my doors, I put the money in. I have known Del Valle and Sinatra since the first time we started business, probably four or five years ago. We started as Johnson & Shubin then and Johnson knew Sinatra and introduced me to him and I called on him frequently and especially when we started collecting overcharges, and I figured, as attorneys, that they weren't compelled to give out any information that I might give them and I spoke freely with them.

W.A.S.

I told them that I have overcharges that I would like to turn in if I knew that OPA wouldn't close our doors and, in fact, at one time my brother played poker and I played poker—I don't play in a big way—but I said, "I can say I won it in poker or horse racing" and he discouraged me. They advised me I should turn it in but I didn't know how but I found the answer when I met Mr. Grossman. I mentioned it to him and told him I was sorry that I didn't mention it to him at the time I talked to Del Valle. He said, "Well, it's one of those things, but if you are sincere I will try to help you." I said, "I'm not trying to hide anything—I am talking to you as a friend." I had spoken to Sinatra and Del Valle several times and they discussed this problem to see what they

(Government's Exhibit No. 50)

could do to help me, but they couldn't find the answer. Del Valle told me when I told him I got Mr. Brady, he says, "That's the party I wanted you to get connected with and in a round-about way I was trying to get Brady to work on your case." He said, "You can't find a better man to know what to do on your case." I think the first time I talked with Del Valle was prior to the time I filed my original 1942 return.

The first day I came to your office, Mr. Brady, you called Washington and talked to Mr. Mooney and asked Mr. Mooney whether the OPA works with the Internal Revenue or whether the Internal Revenue works with OPA. Mr. Mooney says, "To my best recollection to date the Internal Revenue does not work with OPA, but after that date they do not promise anything." He said he would make inquiries on it and get the information and give it to Mr. Brady and two or three days later we did get a report on it.

Q. Mr. Shubin, when you filed your partnership returns for 1942 to 1944, inclusive, and your individual income tax returns for those same years, you knew, did you not, that both the net income and the income tax liability were understated? A. Yes, sir.

Q. To whom did you consider the funds belonged which you had in a separate depository and which were the proceeds of your overcharges?

A. To the Government.



(Government's Exhibit No. 50)

Q. Did you consider that all of these overcharges belonged to the Government or only the tax on the overcharges?      A. The tax end.

Q. Did you make an effort, Mr. Shubin, to keep in a financial position so that you could pay the tax on the overcharges when you got around to filing amended returns?

A. Yes, sir, I did. As an illustration by the fact that when we bought these apartments, we borrowed \$20,000.00 on it and the total price was \$48,000.00 and we figured that, in case the OPA did step in, we can show that through the years that I have been in business—I have been in business since I have been married, 16 yrs., and I thought if the OPA walks in and asks where I got this \$28,000.00, I could have told them I could raise \$28,000.00 but above that I figured the OPA can step in and penalize us, so we borrowed the difference between \$48,000.00 and \$28,000.00.

W.A.S.

We borrowed money from our customers, which is an OPA violation and then we borrowed money from the bank again—the Government always holds back on this new Government boning program to the amount of \$130,000.00 which causes us to borrow money to keep this business going. We did pay loans—in fact, I told OPA that the price that they stated on our boning program that they did not include money borrowed and I told them, “I am

(Government's Exhibit No. 50)

borrowing money—it is costing me so much a month—why don't they give me a set price to offset this to cover the interest?" I signed notes when I borrowed money and paid interest. There are times that we could have made a lot of money if we gambled with this money, which we wouldn't have unless it was a sound investment like the apartment. We used it in inventory when we cut a lot of hogs.

Q. Mr. Shubin, have all your statements been given truthfully and voluntarily?

A. To the best of my knowledge.

Mr. Bircher: When this statement is completed, we will ask you and your representatives to read and review it and you may correct it and sign it.

I have carefully read the foregoing transcript of my testimony, pages 1 to 23, and state it is a true and correct transcript, and that the answers to the questions propounded therein were given freely and voluntarily on my part.

William A. Shubin

Subscribed and Sworn to before me this 13 day of August, 1945.

Samuel J. Phoebus

Special Agent Bureau of Internal Revenue

Case No. 18367Cr. Gov. vs. Shubin. Gov. Exhibit. Date 6/19/46. No. 50 Identification. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

## [GOVERNMENT'S EXHIBIT NO. 51]

[For identification only; not received in evidence]

VOLUNTARY SWORN STATEMENT OF MR. FREDERIC ALEXANDER SHUBIN, TAKEN IN ROOM 844 U. S. POST OFFICE & COURT HOUSE, LOS ANGELES, CALIFORNIA, JULY 24, 1945, PARTIES PRESENT BEING MR. SHUBIN, HIS ATTORNEYS, MR. JOSEPH D. BRADY AND MR. STANLEY C. ANDERSON, SPECIAL AGENTS WALTER E. SCHLICK, SAMUEL J. PHOEBUS AND DONALD O. BIRCHER. STENOGRAPHER OUIDA DUDNEY

(Unless otherwise indicated, questions are propounded by Mr. Bircher and answers made by Mr. Shubin.)

Q. Mr. Shubin, are you here today with a view to making a voluntary sworn statement relative to your income tax liabilities relative to the years 1942, 1943 and 1944? You are ready to tell us what you know about your tax matters? A. Yes, sir.

Q. Will you raise your right hand and be sworn?

A. Do you swear to tell the truth, the whole truth and nothing but the truth, so help you God? A. I do.

Q. You are advised, Mr. Shubin, that any testimony you give here or any documents which are produced at this interview may be used by the Government in any subsequent proceeding, and that you have the right to refuse to answer any questions if you desire to that you feel might tend to incriminate you. Do you understand that, or do you want your attorneys to explain that?

A. No, I understand that.

(Government's Exhibit No. 51)

Q. With that you are ready and willing to proceed and give us any information relative to your tax liability?

A. Yes, sir.

Q. Will you please state your name and present address?

A. Frederic Alexander Shubin, 2767 Laurel Place, South Gate.

Q. And your age, Mr. Shubin, and where you were born?

A. Thirty years old; Los Angeles, California.

Q. How far did you go in school?

A. Graduated from Roosevelt High School.

F.A.S.

Q. You are one of the partners, I believe, in the Vernon Hotel & Restaurant Supply Company, is that correct?

A. Yes, sir.

Q. Please state the names of your partners.

A. William A. Shubin; Jack L. Kissel.

Q. Who is William Shubin, and how old is he?

A. William Shubin is my brother, and he is thirty-six years old, I think.

Q. He was born in the United States, was he?

A. Born in Los Angeles.

Q. And Jack Kissel—how old is he and where was he born?

A. He was born in Los Angeles, and I think he is twenty-six.

Q. In order to shorten your statement and the record here, Mr. Shubin, I will ask you to glance over a copy of a letter written by Mr. Henry J. Rausch, C. P. A., dated June 29, 1945, with reference to his examination of

(Government's Exhibit No. 51)

the income tax liability of the partnership Vernon Hotel & Restaurant Supply Company, and will ask you if the statements contained in Mr. Rausch's letter are true, to the best of your knowledge and belief, so that the same letter can be made a part of this record as being your statement?           A. Yes.

Q. We will ask that that letter be incorporated in your statement, and the answers and representations therein be incorporated in this statement as your answers, to the best of your knowledge and belief.           A. Yes, sir.

Q. Mr. Shubin, there were certain overcharges, that is, so-called black market charges, or charges in excess of OPA ceiling prices made by your firm, the Vernon Hotel & Restaurant Supply Company, during 1942, 1943 and 1944, is that correct?           A. Yes, sir.

Q. Who collected those overcharges from customers?

A. It was handled by my bother and Jack, and at times by myself.

Q. Were the overcharges always collected in cash, or did you sometimes get checks?

A. I would say probably 99 per cent of them were in cash.

Q. By overcharges you mean moneys were collected from your meat customers in excess of the OPA ceiling prices and in excess of the meat prices?

A. It would be in excess of the invoice price because the invoice price would not F.A.S. be in excess of the OPA price.

F.A.S.

(Government's Exhibit No. 51)

Q. You say that you sometimes collected some of these overcharges from customers?

A. If it would be, it would be very small because my end would be the general management of the plant.

Q. Whenever you did happen to collect overcharges from customers, what did you do with the funds?

A. I turned them over to my brother, Bill, or to Jack, who in turn would turn them over to Bill.

Q. What did they do with the funds, if you know?

A. Bill had that money set aside and he kept track of it at all times.

Q. Where would he keep the funds when they were first collected?      A. That I wouldn't know.

Q. You were one of the partners, and as an interested partner in these funds, wouldn't you make it your business to see how much was collected each day or each week and where those funds were kept?

A. To be frank with you I didn't, because I have implicit faith in my brother, because whatever he would say about the business would be all right in my eyes and usually anything I would say would be all right in his eyes.

Q. Didn't you ordinarily help your brother count these funds?      A. I did at times, yes, sir.

Q. Didn't you make records of how much money was accumulated in these funds or depository?

A. I left that up to my brother.

Q. At all times during this period from 1942 to 1944, inclusive, did you attempt to keep yourself fairly well in-

(Government's Exhibit No. 51)

formed as to the total amount that was being built up by this fund of overcharges?      A. Yes, sir.

Q. What interest did you have in this fund? How much of it did you own?

A. Any money taken into the company regardless of whether it be through the normal channels or the illegitimate channels, would go into the partnership.

Q. What was your interest?      A. It was 33-1/3.

Q. That is, you and your brother and Mr. Kissel each owned one-third interest in the regular interest in the partnership, as well as the overcharges received by the partnership?      A. Yes, sir.

F.A.S.

Q. When you filed your individual income tax returns for the years 1942, 1943 and 1944, didn't you realize that your income tax returns understated your actual total net income and your total tax liability for each of those years?      A. I did in all but the year 1942.

Q. What is your answer again, and tell us what you mean?

A. I did in the years 1943 and 1944, but as far as 1942 is concerned, I left that up to my brother and the bookkeeper, and thought that had been taken care of.

Q. Your answer is, then, that when your 1943 and 1944 individual income tax returns were prepared and filed you realized that your net income, as well as your income tax liability, was understated on the original income tax returns, is that correct?      A. Yes, sir.

Q. Why didn't you report your net income and full tax liability in the years 1943 and 1944?



(Government's Exhibit No. 51)

A. At that time the OPA was a very powerful factor, and if we did report it, it would show an excessive profit according to the stipulated percentage of profit that you are supposed to derive from the sales, and at all times we had internal revenue in mind, and if at any time possible that there wouldn't be any reflection of the OPA in putting us out of business, we were ready to make our return, and we conferred with our attorneys on that and we finally found the answer in Mr. Brady's office, and in 1945 made an amended return.

Q. Did you discuss the amount of overcharges that you received or that your partnership received during 1942 to 1944, inclusive, with your brother, William Shubin, on numerous occasions during those years?

A. You mean excess profits?

Q. Yes.

A. Yes, that was quite a problem. In what way do you mean receipts?

Q. During those years did you discuss with your brother on several occasions the fact that you were collecting overcharges from sales?

A. Yes, we did. As the money came in the big problem in our mind was how could we report it in our income tax without any reflection in the OPA. I want to make myself clear on this point. Here we were in business. With all the restrictions governing our business from the OPA we couldn't very well put the money into the business without them charging a higher price because the OPA had their ceiling prices. So our discussion at all times was how could we get it into the business to settle with the internal revenue. I will say this—supposing if

(Government's Exhibit No. 51)

we had taken \$200.00 in excess of the amount of the bill, and we wanted to build up the amount of money that we had—what I am simply trying to say is this, in simple English, the

F.A.S.

money derived from the black market operations we wanted to show in the business, so we could pay our income tax on it, so that was part of our discussion at all times about that surplus money.

Q. What disposition was made of these excess charges that were collected? Where were they kept? What record was kept on them?

A. As I said, my brother Bill kept track of all of that.

Q. Did you on occasions prepare fictitious invoices covering sales of goods in order that some of the funds represented by these excess charges could be projected into your business as additional income—taken into your business?

A. My brother, William A. Shubin, made up most of the fictitious bills. If I did, I made up a few, but I can't recollect how many.

Q. Did you ever seek legal advice prior to 1945 with reference to reporting these excess charges you made in your income tax returns?

A. Yes, sir, we asked the advice of our attorneys.

Q. Whose advice did you seek?

A. Mr. Del Valle and Mr. Sinatra.

(Government's Exhibit No. 51)

Q. What advice did they give you with reference to reporting those excess charges?

A. We thought that—we used one example that supposingly we could take it in as poker winnings, gambling or horse racing winnings, and he said that it would not be a very good idea because of the fact that that money had not been derived from horse racing winnings or poker winnings, and it would stand out like a sore thumb at the OPA.

Q. Who gave you that advice, Mr. Sinatra or Mr. Del Valle, or both?           A. Mr. Del Valle.

Q. What occasioned your filing of amended returns for the years 1942 to 1944, inclusive, which were filed in Washington, D. C., on July 2, 1945? What occasioned you to have amended returns prepared this year?

A. As I have stated before, since these black market operations and the meat picture tightening up as it had, that had been paramount in our minds at all times to file, but because of the OPA being such a big factor in it we didn't have the logical solution, so we got some advice.

Q. Did you know prior to the time you contacted Mr. Brady's office in April or May, 1945, that income tax investigators had started to work making investigations regarding black market profits of other tenants in the same building where you had offices at 3301 East Vernon Avenue, Los Angeles?

A. I will definitely say that we had already contacted before F.A.S.

Mr. Brady ~~from~~ the first time I saw these two gentlemen at the Southern California office. We had already gone to work on it.

F.A.S.

(Government's Exhibit No. 51)

Q. Will you answer the question, Mr. Shubin? At the time you first contacted Mr. Brady's office, at that time did you know that any Government income tax investigators had already started to make investigations of other tenants in the same building that your firm occupied?

A. No, sir. The question is, roughly, that prior to the time we had gone to Mr. Brady's, had we known there was an investigation going on of the tenants in the building, is that it?

Q. Yes. A. No, we hadn't.

Q. During the time that your accountant, Mr. Henry J. Rausch, was making his audit and examination of your income tax liability and that of your partnership during the last two or three months, did you furnish Mr. Rausch with all the information in your possession relative to overcharges that you or your firm had received for his information and use in preparing amended returns?

A. Yes, sir.

Q. You gave him all the information you had?

A. All the information that we had.

Q. Was any favoritism shown by them to customers when overcharges were made against them. That is, were some charged more than others when they purchased meat?

A. Well, the meat situation is what you would say a very complicated picture, as anyone will tell you, at certain times of the year. The situation was thus. At times—it was just a case of supply and demand, that's the easiest way to answer. When the supply was great you would sell below the ceiling price—just what you would call a fair profit to you.

(Government's Exhibit No. 51)

Q. Then, so far as you know, you kept all of your customers the same at one period?

A. That I couldn't say, because Bill was handling the money practically most of the time.

Q. Can you say that as far as you know now, uniform overcharges were made against all your customers during the same period, is that right?

A. There wouldn't be such a thing as a uniform price. It would probably vary from one month to another month.

Q. At the same period, were the same overcharges made to all customers who bought meat from you?

A. That I couldn't say, because Bill handled all the money.

Q. Your answer is you wouldn't know?

A. That is right.

F.A.S.

Q. How were your overcharges based, so much per pound, per cut?      A. Per poundage.

Q. Tell us how the overcharges were, on different grades of meat?      A. That I couldn't say.

Q. How much is the greatest sum that you ever remember collecting in overcharges from any one customer at one time?

A. I would say it would average—would that be over a period of time?

Q. How much is the greatest sum you ever collected at any one moment?

A. You mean from any customer, regardless? The greatest amount that I ever collected was 2¢ per pound.

(Government's Exhibit No. 51)

Q. In dollars, how much was the greatest sum you ever collected at any one time from any customer?

A. I will say the most I ever remember would be \$100.00 at the most.

Q. Did the customers, so far as you know, usually pay for the invoiced goods by check and overcharges by cash?

A. Yes, sir.

Q. Where were these overcharges accumulated during this long period of time from 1942 to 1945?

A. You mean where were they kept?

Q. Yes, where were they built up? In a can, or a drawer, or a box?

A. No, it was kept at my brother Bill's place. He kept them.

Q. Where did he keep the funds, do you know?

A. I wouldn't know. I never questioned him. In fact, I couldn't even say it was at my brother Bill's place. I would say it was in Bill's possession at all times.

Q. Did he keep you currently advised as to how much that fund totaled at different times? Did you know how much the fund totaled at any time?

A. The thing that was paramount in our minds at all times, we kept it set aside, Bill and I—we said that money received from black market operations wasn't rightfully ours, it belonged to the Government. When they took their money out of it, when we had an opportunity to pay without hurting ourselves, we would pay our just taxes.

(Government's Exhibit No. 51)

Q. You realized at all times that you had an unsatisfied income tax liability based upon the fact that your income tax returns had been understated as to net income and as to tax liability? You realized that the Government might come along at any time and ask you to pay additional taxes?

A. We realized this, that we had to pay the Government what was due them, and as soon as the OPA regulations would permit us to make an out and out declaration we would do that, which was proved by our conferences with the attorneys.

F.A.S.

Q. Did you attempt in any way to have entered in your regular books of account any of these black market profits, and if you did so attempt to report any such items of income, please tell us in what manner you did so?

A. Well, we took over a market, I think it was for a period of two months, and it gave us an opportunity to report some of this excess money without any reflection from the OPA because it was a market operation, so Bill put it in as market earnings, and then from time to time, whenever the opportunity presented itself, Bill would make falsified petty case sales, to build up the income of the business. An example of that would be he would take a bill and probably use the name Joe Brown, and write out a sale of \$300.00 or \$400.00, no stipulated amount, and bring that into the business that way, be-



(Government's Exhibit No. 51)

cause we didn't figure any reflection of the OPA on that. The owner of the market was in bad health and he wanted to take off, so we took over the market, handled the sales and such, and put merchandise from the Vernon Hotel and Restaurant Supply into the market. And then we padded the sales, I would say, to about \$10,000.00 in the two-month period, and that went in as an income of the Vernon Hotel & Restaurant Supply Company, which gave us an opportunity—that was one of our best opportunities to put money into the business without any reflection of the OPA. One thing I want you to understand, Mr. Bircher. The paramount thing in my brother Bill's mind, my mind and Jack Kissel's mind was how could we get that money into the business and still not cause any action from the OPA, because the internal revenue had to be paid, but how could we pay it and still remain in business, and I could honestly say that Bill and I and Jack found the solution in Mr. Brady, and it's a big load off my mind.

Q. What interest does Jack Kissel have in the partnership, and what are his duties?

A. Jack Kissel is a one-third partner in the business, and his duties consist of—he started in a new boning process upstairs, boning beef for the Government, and now we are cutting hogs for the Government. He has taken over the cutting of hogs and in the past his duties have been distribution.

Q. Did you have an agreement with your other two partners that you each were to share equally in the legal

(Government's Exhibit No. 51)

profits as well as the illegal or black market profits during those years 1942 to 1944, inclusive?      A. Yes, sir.

Q. Have all your answers been given voluntarily and been the truth of the best of your ability today?

A. My answers have, but I will admit that you had me confused in many instances.

Q. Your answer is that your statements have been given voluntarily and your answers have been given truthfully to the best of your ability today?

A. That is right.

F.A.S.

I, Frederic Alexander Shubin, hereby certify that I have carefully read the foregoing transcript of my statement, and that my answers to the questions herein are, to the best of my knowledge and belief, true and correct.

Frederic A. Shubin

Subscribed and sworn to before me this 20 day of August, 1945, at Los Angeles, California.

Samuel J. Phoebus

Special Agent

~~Frederic A. Shubin~~

Case No. 18367 Cr. .... vs. Shubin. Gov. Exhibit. Date 6/19/46. No. 51 Identification. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

## [GOVERNMENT'S EXHIBIT NO. 52]

[For identification only; not received in evidence]

SWORN STATEMENT OF MR. JACK L. KISSEL,  
GIVEN IN THE OFFICE OF THE INTELLI-  
GENCE UNIT, BUREAU OF INTERNAL  
REVENUE, ROOM 844, U. S. POST OFFICE  
AND COURT HOUSE, LOS ANGELES, CALI-  
FORNIA, AUG. 1, 1945.

Present:

Donald O. Bircher, Special Agent

Samuel J. Phoebus, Special Agent

Joseph D. Brady, Attorney for Taxpayer

Staley C. Anderson, Attorney for Taxpayer

Gladys M. Callaway, Stenographer

(Questions propounded by Mr. Bircher unless otherwise indicated.)

Q. Mr. Kissel, are you ready and willing to give a voluntary sworn statement at this time relative to your individual income tax liability and relative to the business and income of the Vernon Hotel & Restaurant Supply Company covering the years 1942, 1943 and 1944?

A. Yes, I am.

Q. Will you please raise your right hand? Do you swear to tell the truth, the whole truth, and nothing but the truth in this examination, so help you God?

A. I do.

Q. Please state your full name and present residence address?

A. Jack L. Kissel, 1525 Nairn Avenue, Los Angeles, Zone 22.

(Government's Exhibit No. 52)

Q. You are advised, Mr. Kissel, that you are not required to incriminate yourself; and that you have a right to decline to answer any question you feel might tend to incriminate you. Do you understand that or do you wish your attorneys, Mr. Brady and Mr. Anderson, to explain that to you?

A. Yes, I would like them to explain it.

(Discussion off record.)

Q. You understand then now, since your attorneys have explained your rights, and are you willing to proceed?      A. I am.

Q. Mr. Kissel, please tell us when you first became connected with the business known as the Vernon Hotel & Restaurant Supply Company of Los Angeles?

A. As an employee or as a partner?

Q. Any way—the first date you became connected with that company and in what capacity.

A. The first part of 1942 as an employee.

J.L.K.

Q. What was your compensation to start with?

A. Well, I got \$5.00 a week and meat. I just delivered in the mornings—I wanted to learn the meat business. I had two jobs—I worked at Young's Market Company. I worked from two or three o'clock in the morning until seven and then would buy my breakfast and then went to work for Young's market. I was a salesman there.

Q. When did you first become a partner?

A. After this, I became a full-time employee—I quit Young's—I could see no future in it. That was the latter

(Government's Exhibit No. 52)

part of May or first part of June—first week of June, same year—and then in November I became a partner.

Q. How did you become a partner? Did you make a contribution to capital?

A. No, we paid the former partner off and what was in the company just stayed in the company. There was nothing contributed towards the cash of the company. The outstanding bills and everything there, they just stayed right in the company and we took our share over. I paid the retired partner \$700.00 or \$800.00, I believe.

Q. Mr. Kissel, you are acquainted, I believe, with the fact that amended income tax returns were recently filed by you and by the partnership, Vernon Hotel & Restaurant Supply Company. Do you know that to be a fact?

A. Yes.

Q. Tell us why those amended returns were filed? Do you know what income was reported therein that had not been previously reported?

A. You mean the figure that we used as an amended return?

Q. Yes, what was the source of that additional income shown on the amended returns?

A. The amount of money that Bill collected in addition to what was put on the bills, and the figure was derived by Mr. Rausch—he went through all the money we spent. It was an extensive amount of data he had gathered. He worked two or three months, I think, and he said this was about the most accurate figure he could get.

Q. Is it correct to understand that the additional income reported in the amended income tax returns filed

(Government's Exhibit No. 52)

by you and your partners resulted from overcharges, or sums collected in cash, in excess of OPA ceiling prices?

A. Yes.

Q. Who kept a record of those items of income during the years 1942, 1943 and 1944?

A. There was no record kept that I know of. I never knew for three or four months at a time what money we had unless I asked Bill.

Q. Did you ever see him count the money?

A. No, I really never knew where it was. Fred and I trusted Bill implicitly but I was afraid if he ever got killed we would never know where it was, and he was afraid if we got into a

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party, I would brag about it.

Q. In the year 1942, after November 16th, what partnership interest did you have in the Vernon Hotel & Restaurant Supply Company?

A. Well, to begin with, Bill wanted the bigger share and Fred and I both disagreed with him—it was a topic of discussion. We sat down at the table at Bill's house—he wanted 51% and we disagreed with him at the time, and the fact that I was a little bit "green" in the business, Fred thought maybe I should get the least amount. Fred continually maintained that he should have received more in the business than I did, so finally he almost convinced Bill to that extent because I had not too much knowledge of the business. Then they decided to finally definitely draw a partnership agreement that I had refused to sign, and, after further discussion, which had been going on for quite some time, they definitely decided for a three-

(Government's Exhibit No. 52)

way partnership. At the time there was no capital involved—it was purely physical labor the three of us was putting in and I happened to be putting in as much labor as they were. I had complete charge of the over-all production of the business and I thought I should have one-third and we mutually agreed among ourselves that it should be one-third.

Q. You each were equal partners then?

A. Yes. Bill had \$1,400.00 in it and Fred and I had \$600.00 or \$700.00 apiece, and then we started in the hog business.

Q. In November 1942?

A. No, the first part of the following year.

Q. Mr. Kissel, the original partnership returns for the period November 16, 1942 through December 31, 1944, showed a total net profit of \$104,452.61, not including the period from November 16, 1942 until December 31, 1942, whereas the amended returns for the entire period from November 16, 1942 to December 31, 1944, report a total income of \$245,577.61, or a total additional income reported in the amended returns of \$141,125.00 not reported in the original returns. Is it your opinion that the total additional income reported in the amended returns resulted from the receipt of overcharges, or charges in excess of OPA rules, which were collected and which were not recorded in your books or reported in your original returns? A. As a result, yes.

Q. Do you know, Mr. Kissel, whether any of these overcharges were reported in your original returns under some other guise on fictitious invoices which were prepared and sandwiched in with your regular invoices?



(Government's Exhibit No. 52)

A. I know definitely as a fact that fictitious bills had been made with money turned into the company.

Q. Do you know why they were made?

A. We wanted to put it in the business and declare our income tax so that we could use the money right in the business. It was always a discussion with us as to

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how we could take and bring the money out in different bills. Bill had me going crazy many times when we would build up the money and he would worry about how to put it in and we would make up bills, but I always tried to stay out of it—I was in the production end.

Q. What do you know about a market which was operated by your partnership for a short period?

A. It was Cliff's Market and we took it over, I think, for two or three months, or a month—I don't remember the amount of time. We worked there when we had a chance to help out the fellows and I knew that was one of the ways we threw in extra money. We threw in \$10,000.00 or \$12,000.00—it wasn't exactly a profit from the market but actually cash that Bill had on hand that he declared as a profit from the market.

Q. From what source did Bill Shubin obtain the \$10,000.00 or \$12,000.00 which he added to the actual profits realized by the market?

A. From overcharges. In actuality the market made about \$1,500.00 to \$2,000.00 profit and this was a chance for us to declare what extra money Bill had for income tax, so we declared that amount in addition to the profits of the market.

(Government's Exhibit No. 52)

Q. Why didn't you and your partners show all these black market profits right on your books and records and invoices in accordance with your actual receipts from meat sales?

A. Well, we were always afraid of the OPA, and in making out these fictitious bills you could only put in so much because if you went into excess over what they allowed you, it would show immediately on your books at the end of a month's time, so Bill could only keep putting in what he figured would be a rather nominal sum so that it did not look ridiculous at the end of the month.

Q. Why didn't you report the full amount of your net profits at the end of each year on your individual income returns regardless of whether you showed the full amount on your books and records?

A. For the same reason. We never did know how to declare it and Bill always said if we did, OPA would step in and close our doors. We thought that anything that we declared would also be known to the OPA and the license to operate our business would be taken away from us.

Q. What license do you refer to?

A. Wholesaler's license.

Q. Who issues those licenses?                      A. The OPA.

Q. What are the requirements for those licenses?

A. There is a hotel supplier's license, wholesaler's license and there is a

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jobber's license. I think there are the three and each has their individual requirements as to mark-up in price and to whom you can sell. We knew that if it became known to OPA that we sold above the specified ceiling prices our licenses would be taken away.

Q. Who actually collected the excess charges on meat sales by your company during the years 1942 to 1944, inclusive? A. Bill always did.

Q. Did you also sometimes collect some of these excess charges?

A. The only times I would—not being in the office—would be just when I was around there and Bill would be in a conference and he would say, "Collect this amount," and I would and then I would always hand it to Bill. My answer refers to the period subsequent to November 16, 1942.

Q. Who set or determined the amount of overcharges to be collected in your business?

A. Well, as far as I know, there was never a set amount. Bill never let us know one day to the next—some he charged and some he didn't—one day he would have a figure and the next day a different one and some of the customers he would charge one price one time and another price at another time—it was just a matter of supply and demand.

Q. How much were the overcharges in cents per pound—do you know?

A. There was never a set figure—I could never tell you. We favored some of our customers—we were figuring on our postwar business.

(Government's Exhibit No. 52)

Q. Where were these cash funds usually kept after their collection and prior to the time distribution of such funds was made during those years?

A. Like I say, Bill always had them. I don't know where he kept them and I still don't know. I mentioned this—Fred and I both trusted Bill implicitly. I worked with Bill for quite some time in another business. We needed \$100.00 or something at one time and Bill told me where the money was—explained to me, and I went to his house to get it and I couldn't find it—I hunted and hunted. After he told me where it was, I spent at least thirty or forty minutes trying to find it and I couldn't. We never had a complete distribution of this fund represented by excess charges, but occasionally small sums were withdrawn from the fund on each of our requests. As far as I know the bulk of the funds was retained by Bill with the intention of paying the income tax when the occasion to declare our income tax arose. When the amended returns were filed about July 2, 1945, about \$76,000.00 was paid and none of this amount came directly from my or Fred's pockets, but it was all the amount of cash Bill had on hand.

Q. Where did Bill say the money was?

A. In one of his drawers.

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Q. You say then that the \$76,000.00 which was paid on the amended returns for the partnership and the individual returns of the partners came from the fund which had been kept intact, or partially so, by Bill Shubin and which he had built up from these excess charges, which were not recorded in your books? A. Yes.

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Q. When you filed your individual income tax returns for the years 1942, 1943, and 1944, you realized, didn't you, that all of your income was not reported in those returns?

A. All of it—no. I told Mr. Brady I definitely thought all of the income was declared in 1942, and I didn't know the tax was figured from January to January—I thought it was from March to March. I had never figured my income tax myself, and I thought also that when Bill had made these fictitious bills he had declared the money he had up to that time.

Q. Now, as to your individual income tax return for 1943, which was filed about March 1944, did you know at the time you filed that return that a part of the excess charges, or a part of your net income, represented by the overcharges, was omitted in that return?

A. Yes.

Q. Is your answer the same then as to your individual income tax return for the year 1944—did you know that some of your net income was omitted in your original return for 1944?

A. Yes.

Q. Please state why you didn't include all of your income that you were conscious of having received at the times you filed your individual income tax returns for the calendar years 1943 and 1944?

A. As I stated before, I actually thought the OPA had access to the income tax returns and if they did so find any excess amounts, it was certain we would lose our operating wholesaler's license and be put out of business. At the time my original returns for 1943 and 1944 were

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prepared and filed by me, I knew that the net income thereon reported was understated, but I did not know by how much.

Q. What were your functions in the business—what were your duties?

A. Well, I was an over-all supervisor of all the production. I had complete charge of everything that came into the place and went out. I allocated the merchandise to the customers we figured in our postwar business. As I said before, I was interested in giving them a little better break, and I helped cut hogs when there was a man short—helped break beef when there was a man short there. I did part of every job that we have in our place, outside of the office. I had nothing at all to do with the prices that the merchandise was sold for.

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Q. Mr. Kissel, do you know whether your firm found it necessary to pay overcharges to the Southern California Meat Supply Company No. 2 in connection with its slaughtering for your company?

A. As far as I know, we never paid any overcharges to anyone. Bill always said he would rather go out of business than pay anyone overcharges. I had no connection with the direct purchase of merchandise, although I told Fred and Bill what I would need or what I would be short of. We always bought carcass hogs and beef, carcass lambs and veal. There was never any live stock that was purchased by us and killed as far as I know.

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(Mr. Phoebus questioning)

Q. This meat market operation that you had—when you reported your income from it, you inflated the income a great deal. When did that market operation stop?

A. I think it was in 1943 that we had the market.

Q. Was it in the spring of the year or the fall of the year?

A. It has been so long ago, I don't remember. All I did was just help the fellows out when I had spare time.

Q. When were the profits, including the inflated part of the profits, entered on the books?

A. That I don't know. The only thing I do know is that when Bill made the income tax return, he told me he was able to throw in a certain amount of money in addition to the profits of the market.

Q. That was the first time you discussed this device of increasing your income by inflating the profits of the market?

A. No, we had always discussed it. I know there were fictitious bills made.

Q. At the time this matter was mentioned in connection with the income tax return, was that the first time you remember it having been mentioned?

A. No.

Q. It was mentioned on a prior occasion.

A. Yes.

Q. In what connection?

A. As to the amount to turn in that wouldn't seem a ridiculous figure to OPA in running our market.

Q. Was there any necessity of bringing capital into the business during the year 1943?

A. Not that I know of.



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Q. That wasn't one of the motives then for increasing the profits from the

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market?

A. Our definite motive was to be able to declare it for income tax.

Q. I didn't ask that question. Was one of the motives to bring capital into the business for use?

A. The only reason I did know for putting it into our business was to declare it as income tax—I had no other knowledge.

Q. When did your firm commence to bone meat for the Government on a big scale?

A. We started to bone the latter part of last year.

Q. Late in 1944? A. Yes.

Q. Prior to that your boning operation was limited in comparison to your subsequent boning operations?

A. Yes.

Q. Then, as far as the packers were concerned, you had practically no advantage in your dealings with them because of the fact that you had boning facilities that were not otherwise available to them?

A. That's right. We had little advantage.

Q. You testified that you paid no overcharges for meat. In view of the fact that meat was difficult to obtain, how do you explain the fact that you were to get this economic advantage?

A. We had been in business prior to the war and we operated a legitimate business and it was a good business. We were in the same position as some of our "pet" accounts were—we expected a postwar business and I think that's the way the packers felt about it.

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Q. You think everyone on Vernon Avenue paid ceiling prices for his meat? A. So far as I know, yes.

Q. Though you received over the ceiling price when you sold meat, you testified Bill said he would go out of business if he had to pay overcharges. Do you think that's fair?

A. Well, in the meat business you have, while I don't want to bring out the names, customers that buy from you only when it necessitates buying and they can't buy any place else, and they were the ones that were paying. Our regular accounts we never charged, overcharged.

Q. You know Hyman Stillman and Lou Segal of the Southern California Meat Supply Company?

A. Yes.

Q. About December 27, 1944, Vernon Hotel & Restaurant Supply Company wrote a check for approximately \$22,000.00 to Southern California Meat Supply Com-

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pany No. 2. What was that for?

A. I never knew there was a check written for that amount.

Q. Did you receive in the cooler at about that time a large amount of meat from any source?

A. I know we received a lot of meat from them. We were boning for them and they allowed us a certain percentage for our civilian sales.

Q. Was this an old-line company that had been established in business for a long time?

A. I couldn't tell you.

Q. You don't know when Hyman Stillman came on the street? A. No.

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Q. Can you tell us of any business enterprise that you or your partners had outside of Vernon Hotel & Restaurant Supply Company?

A. None that I know of, except the apartment house. That's the only one I know of.

Q. And the California Meat Company—Mr. Woodward—was that considered a partnership venture?

A. I couldn't tell you. I don't know how that was worked—to this day, I don't know.

Q. You knew that a member of the firm, at least, had some interest in the California Meat Company?

A. Yes.

Q. But whether part of those funds were yours, or part of the other partners, or all belonged to Bill Shubin, you don't know?      A. No.

Q. Do you know whether Bill loaned money to the California Meat Company?      A. No, I don't know.

Q. Did I understand you to say, in connection with Bill Shubin and your confidence in him, that you were associated with him in another business?      A. Yes.

Q. What business?      A. Kermin Food Products.

Q. When was that?

A. That was prior to the time I worked for Dr. Pepper. I worked for Dr. Pepper for two years—it was around 1937 or 1938.

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Q. When did you leave school?

A. I graduated in January 1936.

(Mr. Bircher questioning)

Q. What prompted your company to file amended income tax returns for the years 1942 through 1944, which were filed on or about July 2, 1945?

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A. Well, it had always been a discussion with us as to how we could enter our money out in the open and file our income tax and not worry about it. Bill came to Fred and me and said that a friend had told him that he knew of a way we could declare our money and he was very much in favor of it and he would go right ahead and proceed with it, and we were in great favor of it, so Bill went ahead with it. The man's name was Henry Grossman.

Q. When did Bill come and make this proposal to you first?

A. It must have been four months ago—three or four months ago. I think it was about that time. I know we had spent quite some time with Mr. Rausch. I think he spent two months with us as to the amount of money we had actually used and had on hand.

Q. At the time Mr. Shubin proposed to you that you and your company should file amended returns, which was sometime in April 1945, did you know prior to that time that the Internal Revenue Department had started an investigation of your income tax liability or of the income tax liabilities of other tenants in your building?

A. No, definitely not. The only time I knew was when he (indicating Mr. Phoebus) walked into the office with another young fellow and explained that to us. That was the first time I knew.

Q. When was that, with reference to the time Wm. Shubin proposed to you that these amended returns should be filed?

A. It was just the day after our checks had been made for our income tax and we told Mr. Phoebus at the time

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he visited us in our office that our checks had just been made out the day previous and were in the mail.

Q. Mr. Kissel, did you ever see a little loose-leaf book or a bound note book wherein Mr. Shubin recorded the overcharges?

A. No, I don't think he ever kept any record book. I know that when we asked to know just about how we stood, he would have to go home and count the money. Sometimes we wouldn't know for three or four months how we stood—we just wouldn't bother about asking.

Q. During all this period from November 1942 until the end of December 1944, did you keep fairly current with the knowledge of how much your equity was in the fund that Bill Shubin kept at home?

A. Oh, well, there would be times when he would enter it in the business in the nature of fictitious bills that we wouldn't know anything about. Maybe

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at the end of the month he would say he entered so much into the business by means of these fictitious bills.

Q. Did you and your partners have a mutual agreement that you each owned one-third of the funds represented by this cash fund which Bill Shubin kept at home?

A. Yes, a mutual agreement.

Q. That was your understanding that you each owned a one-third interest?

A. Yes.

Q. Did you ask Bill from time to time how much the total of the fund was?

(Government's Exhibit No. 52)

A. Yes, that is, not the fund but the total value of the business—everything we had.

Q. But you stated that occasionally you asked how much was represented by this cash fund which he kept at home and he would have to go home and count it.

A. No, how we stood in the total of our business. I was never interested in the money he had at home except in the relationship it had to the total value we had in our business.

Q. Mr. Kissel, did you have any discussion, or do you know of any discussion, had by your partners, with any attorneys relative to some method by which you could report in your income tax returns these black market profits?

A. I didn't have any discussion with any attorneys but I know my partners had discussions with our attorneys, Vincent Sinatra and Mr. Del Valle, of Arnerich, Del Valle & Sinatra, regarding declaring the money through gambling, that is, cards, poker playing or horses, and Bill said the attorneys thought it was a very poor idea to declare it that way. I have known of these discussions, through what my partners have told me, for at least two years.

Q. Then it is your statement that Bill Shubin related to you that he had discussed this matter with your company's attorneys, as to whether or not some of these black market profits could be reported in your individual income tax returns under the guise of gambling profits, and Mr.

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Shubin reported to you that the attorneys advised him that that would not be proper; is that correct?

A. That's correct.

Q. Mr. Kissel, you are married? A. Yes.

Q. Please state the date. A. June 18, 1938.

Q. Do you have any dependents?

A. Two children—boy and a girl.

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Q. Mr. Kissel, you state that you were quite concerned over this question, or at least you discussed with your partners this question, of whether or not you should report your black market profits, since you were afraid the OPA officials might learn of it. Did you also discuss that matter with your wife during those years?

A. No, I never discuss any business with my wife.

Q. Did your wife know at any time that you, or your firm, was charging prices and making collections in excess of OPA ceiling prices for meat sold? A. No.

Q. At the time your individual income tax returns were filed for the years 1942, 1943 and 1944, did you advise your wife that all of your profits were not reported in those returns?

A. No, she didn't know anything about it.

Q. At the time you filed your original individual income tax returns for the years 1943 and 1944, why did you not have your wife sign the returns, or why didn't you have her file separate returns?



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A. They would just hand me the income tax returns and I would just sign the things and that was all there was to it and I thought it was properly taken care of.

Q. Have all of your statements and your answers this morning been given voluntarily by you, Mr. Kissel?

A. Yes.

Q. Have your statements and answers been given truthfully and to the best of your knowledge and belief?

A. Yes.

I have carefully read the foregoing transcript of my testimony, pages 1 to 12, and state that it is a true and correct transcript and that the answers to the questions propounded therein were given freely and voluntarily on my part.

Jack L. Kissel

Subscribed and Sworn to before me this 13 day of August, 1945.

Samuel J. Phoebus

Special Agent Bureau of Internal Revenue

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Case No. 18367 Cr. U. S. vs. Shubin. Gov. Exhibit. Date 6/19/46. No. 52 Identification. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

Honorable J. F. T. O'Connor, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

\* \* \* \* \*

Los Angeles, California, Friday, June 21, 1946, 2:00 o'clock.

The Court: Stipulate that the jury is present, gentlemen?

Mr. McLaughlin: So stipulated.

Mr. Neukom: So stipulated.

The Court: Stipulate that the defendants are present?

Mr. McLaughlin: So stipulated.

Mr. Neukom: So stipulated.

The Court: Members of the jury, it becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty, as jurors, to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider the evidence for that purpose.

In this indictment upon the arraignment in this court the defendants entered a plea of not guilty which puts in issue every material allegation of the indictment which I am about to read to you.

"In the District Court of the United States, in and for the Southern District of California, Central Division. In the District Court of the Southern District of California, ss:

"The Grand Jurors of the United States of America, being duly impaneled, sworn and charged in the District

Court for the Southern District of California, Central Division, in the [2] September 1945 Term of said Court, having begun but not finished during the said September Term of Court, among other things, the matter of the investigations charged in this indictment, and having continued to sit by the order of this Court in and for the said District during the February 1946 Term to complete inquiries begun but not finished at the original term, and inquiring for that District, upon their oaths find and present as follows:

### COUNT 1

“1. That William Shubin, Frederick Alexander Shubin, and Jack L. Kissel, whose names are to the Grand Jurors otherwise unknown, who are hereby indicted, and are hereinafter called the defendants, at all times material herein engaged in the sale of meat as wholesaler and/or hotel supply house of meat, under the Emergency Price Control Act of 1942 and Maximum Price Regulations Nos. 148, 169 and 239, under the firm name and style of Vernon Hotel and Restaurant Supply Company.

“2. That the said defendants, since on or about November 1, 1942, and continuously thereafter to and including the finding and presenting of this indictment, in the County of Los Angeles, State of California, and within the Division and District aforesaid and in other places to the Grand Jurors unknown, did feloniously and unlawfully conspire, combine and confederate together, and with divers other persons whose [3] names are to the Grand Jurors unknown, to commit offenses against the United States of America, to wit:

“a. That the said defendants would refuse and cause others to refuse to sell meat to any prospective purchaser

unless the price paid therefor was in excess of the maximum prices permitted under the Emergency Price Control Act of 1942, and of the Maximum Price Regulations Nos. 148, 169 and 239 thereunder;

“b. That the said defendants would sell and cause others to sell meat at prices in excess of the maximum prices permitted under the Emergency Price Control Act of 1942 and Maximum Price Regulations Nos. 148, 169 and 239;

“c. That the said defendants would make and cause others to make false, fictitious and fraudulent entries upon the records kept by and for the said defendants in the conduct of their aforesaid business, in connection with the purchases and sales of meats, in violation of the aforesaid Emergency Price Control Act of 1942 and Maximum Price Regulations Nos. 148, 169 and 239;

“d. That the said defendants would make and cause others to make fictitious payments, loans, transfers, collections and receipts of money to and from other persons and firms for the purpose of concealing, and would otherwise conceal, the aforesaid illegal charges, false, fictitious and fraudulent entries and receipts of money for meat in excess of the [4] maximum prices permitted under the aforesaid Emergency Price Control Act of 1942 and Maximum Price Regulations Nos. 148, 169 and 239;

“e. That the said defendants would issue and would cause others to issue various checks, notes and other evidences of payments, loans, collections, transfers and receipts which did not in truth and in fact represent the true and actual transactions between the parties, but which were fictitious and fraudulently made, received, transferred and entered on the books and records of the afore-

said defendants for the purpose of concealing their other aforementioned illegal activities in violation of the Emergency Price Control Act of 1942 and Maximum Price Regulations Nos. 148, 169 and 239;

“f. That the said defendants would cause and would persuade others to cause divers persons to make false, untrue and fraudulent entries upon the records of the said divers persons for the purpose of concealing the aforesaid illegal activities of the said defendants;

“g. That the said defendants would engage and would cause others to engage in various similar and dissimilar schemes, tricks, falsifications and methods of their aforesaid illegal activities as might occur to them and others from time to time, in order to commit and to conceal the commission of violations of the aforesaid Emergency Price Control Act of 1942 and the Maximum Price Regulations Nos. 148, [5] 169 and 239;

“h. That each of the said defendants would share equally with the other defendants in all gains and profits flowing and accruing from any and all of the above-described illegal activities.

“3 That in furtherance of, and to effect the purposes and objects of said conspiracy, the said defendants, at the times and places hereinafter set forth, within the jurisdiction of this Court, committed the following overt acts:

“a. On or about November 16, 1942, the defendants entered into a partnership agreement.

“b. On or about December 31, 1943, the defendants made or caused to be made an entry on the general ledger of the Vernon Hotel and Restaurant Supply Company, account 301, showing total sales of meat by them during 1943 of \$747,394.28.

“c. On or about March 31, 1943, the defendants made or caused to be made an entry in the general ledger of the Vernon Hotel and Restaurant Supply Company, account 264, of the receipt in that account of \$25,273.50;

“d. On or about June 30, 1943, the defendants made or caused to be made an entry upon the records of the Vernon Hotel and Restaurant Supply Company, account 104, showing accounts receivable in the sum of \$2,860.55.

“e. On or about October 31, 1943, the defendants made or caused to be made an entry upon the records of the Vernon [6] Hotel and Restaurant Supply Company, account 104, showing accounts receivable in the sum of \$15,477.79.

“f. On or about November 30, 1943, the defendants made or caused to be made an entry upon the records of the Vernon Hotel and Restaurant Supply Company, account 104, showing accounts receivable in the sum of \$11,713.30.

“g. On or about April 30, 1944, the defendants made or caused to be made an entry upon the records of the Vernon Hotel and Restaurant Supply Company, account 104, showing accounts receivable in the sum of \$17,999.56.

“h. On or about August 31, 1944, the defendants made or caused to be made an entry upon the records of the Vernon Hotel and Restaurant Supply Company, account 104, showing accounts receivable in the sum of \$19,490.27.

“i. On or about February 24, 1945, the defendants made or caused to be made an entry upon the records of the Vernon Hotel and Restaurant Supply Company, account 104, showing accounts receivable in the sum of \$57,943.80.

“j. On or about April 28, 1945, the defendants made or caused to be made an entry upon the records of the Vernon Hotel and Restaurant Supply Company, account 104, showing accounts receivable in the sum of \$103,030.75.

“k. On or about April 17, 1945, the defendants issued check No. 6962 of the Vernon Hotel and Restaurant Supply Co., payable to Wm. A. Shubin; [7]

“l. On or about July 25, 1945, the defendants issued check No. 72898 of the Vernon Hotel & Restaurant Supply Co., payable to William Shedd;

“m. On or about August 17, 1945, the defendants issued check No. 7382 of the Vernon Hotel & Restaurant Supply Co., payable to Sidney Blau;

“n. On or about August 21, 1945, the defendants issued check No. 7396 of the Vernon Hotel & Restaurant Supply Co., payable to the A. M. Provision Co.;

“o. On or about September 27, 1945, the defendants issued check No. 7540 of the Vernon Hotel & Restaurant Supply Co., payable to Rudolph Hauswald;

“p. On or about August 27, 1945, the defendants issued check No. 7535 of the Vernon Hotel & Restaurant Supply Co., payable to J. Joe Vega;

“q. On or about the 19th day of July 1944 the defendants issued or caused to be issued Invoice No. 41736 of the Vernon Hotel & Restaurant Supply Co.;

“r. On or about October 31, 1944, the defendants issued or caused to be issued Invoice No. 44235 of the Vernon Hotel & Restaurant Supply Co.;

“s. On or about December 4, 1944, the defendants issued or caused to be issued Invoice No. 45128 of the Vernon Hotel & Restaurant Supply Co.;



“t. On or about August 10, 1945, the defendants issued [8] or caused to be issued Invoice No. 5252 of the Vernon Hotel & Restaurant Supply Co.;

“u. On or about September 6, 1945, the defendants issued or caused to be issued Invoice No. 13013 of the Vernon Hotel & Restaurant Supply Co.;

“v. On or about December 12, 1945, the defendants issued or caused to be issued Invoice No. 16645 of the Vernon Hotel & Restaurant Supply Co.;

contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.”

I will read the language in Count 2 rather carefully because counsel for the government and the defendant have agreed that it will not be necessary to read the language in the various counts but to state the substance of them:

“And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 4th day of January 1944 in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants William Shubin, Frederick Alexander Shubin and Jack L. Kissel, doing business as aforesaid under the firm name and style of Vernon Hotel & Restaurant Supply Company, wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Emil [9] Dvorak certain meat items, to wit: pork loins, short cuts (‘S/C’); pork shoulders, New York (‘NY’), as shown on Invoice No. 39251 of the Vernon Hotel & Restaurant Supply Company, for a price per pound which was, as the said

defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 148 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: for pork loins, short cuts, 26 cents a pound; for pork shoulders, New York, 25 cents a pound; contrary to the form of the state in such case made and provided and against the peace and dignity of the United States of America.”

Count 3 contains the same general language except that it alleges that on the 21st day of January 1944 the defendants unlawfully sold to Emil Dvorak Grade A veal as shown on Invoice No. 39609 in violation of Maximum Price Regulation No. 169, and that the price for that veal as alleged in the indictment was 23 cents a pound. That is Count 3.

Count 4 is again in the same language but it alleges a sale on the 19th day of July 1944 by the defendants named alleging that they unlawfully sold to Emil Dvorak pork shoulders, New York; pork loins, short cuts (“S/C”), as shown on Invoice No. 41736, alleging that it was sold above the maximum price regulation No. 148 and that the maximum price regulation for pork shoulders, New York, was 26-1/4 cents a pound; for pork loins, short cuts, 27-1/2 cents a pound.

Count 5 again has the same language except the date. It alleges that on or about the 4th day of August 1944 the defendants unlawfully sold to Emil Dvorak pork loins, short cuts (“S/C”); pork shoulders, New York (“NY”); pork legs, Invoice No. 42076, in violation of Maximum

Price Regulation No. 148. It alleges that for pork loins, short cuts, 27-1/2 cents a pound; for pork shoulders, New York, 26-1/2 cents a pound; for pork legs, 27-1/2 cents a pound.

Count 6 is in the same language, that the defendants on the 21st day of September 1945 unlawfully sold to Emil Dvorak pork loins, short cuts ("S/C"); pork shoulders, New York ("NY"), as shown by Invoice No. 13563. The indictment alleges that this was sold above the maximum price regulation No. 148, that the maximum price for pork loins, short cuts, was 26-3/4 cents a pound; for pork shoulders, New York, was 25-3/4 cents a pound.

Count 7 charges that on the 12th day of December 1945 the same defendants unlawfully sold to Emil Dvorak pork loins, short cut ("S/C"); pork shoulders, New York ("NY"); bacon; hams, as shown on Invoice No. 16645. The indictment alleges that these were sold in violation of the maximum price regulation No. 148, and the maximum price per pound for pork loins, [11] short cut, was 27 cents a pound; for pork shoulders, New York, 26 cents a pound; for bacon 27 cents a pound; for hams 34-1/4 cents a pound.

Count 8 charges that on or about the 25th day of October 1944 the defendants sold to Emil Dvorak unlawfully Grade A veal as shown on Invoice No. 44072 in violation of maximum price regulation No. 169 which fixed the maximum price for Grade A veal at 22-3/4 cents a pound.

Count 9 charges that on or about the 17th day of September 1945 the defendants unlawfully sold to Emil Dvorak pork loins, short cuts; pork shoulders, New York ("NY") as shown by Invoice No. 13357. The indict-

ment alleges that this was a violation of maximum price regulation No. 148 which fixed the price for pork loins, short cuts, at 26-3/4 cents a pound; for pork shoulders, New York, 25-3/4 cents a pound.

Count 10 alleges that on or about the 16th day of February 1945, the same defendants unlawfully sold to Austin T. Snider Grade C beef as shown by Invoice No. 47443. The indictment alleges that this was in violation of maximum price regulation No. 169 which fixed the price for Grade C beef at 18-1/4 cents a pound.

Count 11 alleges that on the 20th day of March 1945 the defendants unlawfully sold to George F. Veuhoff's Market Grade B veal as shown by Invoice No. 48245 in violation of [12] maximum price regulation No. 169 which fixes the maximum price of Grade B veal at 21 cents a pound.

Count 12 has been withdrawn.

Count 13 has been withdrawn.

Count 14 has been withdrawn.

Count 15 has been withdrawn.

Count 16 alleges that on or about the 22nd day of October 1945 the defendants wilfully and unlawfully made or caused to be made an entry false in a material respect. I will read Count 16 in full because it deals with another situation:

“And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 22nd day of October 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants

William Shubin, Frederick Alexander Shubin and Jack L. Kissel, doing business as aforesaid under the firm name and style of Vernon Hotel & Restaurant Supply Company, did wilfully and unlawfully make or cause to be made an entry false in a material respect upon Invoice 14649 of the aforesaid Vernon Hotel and Restaurant Supply Company, showing a total price of \$247.26 and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry, and said record was [13] a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulation 148 thereunder, which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Count 17 I will just state the substance of it because I have read Count 16 in full. It charges that on or about the 8th day of May 1945 the defendants wilfully and unlawfully made or caused to be made an entry false in a material respect on Invoice No. 3729 of the aforesaid Vernon Hotel and Restaurant Supply Company, showing a total sum charged of \$89.10. The indictment alleges that this was in violation of maximum price regulation No. 148.

Count 18 charges that on or about the 20th day of April 1945 the defendants did wilfully and unlawfully make or cause to be made an entry false in a material respect upon Invoice No. 3327 of the aforesaid Vernon Hotel and Restaurant Supply Company, showing a total sum charged of \$169.35. This alleges also that this

was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and maximum price regulation No. 148.

Count 19 has been withdrawn.

Count 20 charges that on or about the 15th day of November 1945 the defendants did wilfully and unlawfully [14] make or cause to be made an entry false in a material respect upon Invoice No. 15584 of the aforesaid Vernon Hotel and Restaurant Supply Company, showing a total sum charged of \$319.89. The indictment alleges that this was in violation of the Emergency Price Control Act of 1942 and maximum price regulations 148, 169 and 239.

Count 21 charges that on or about the 2th day of December 1944 that the defendants willfully and unlawfully did make or cause to be made an entry false in a material respect on Invoice No. 45741 of the aforesaid Vernon Hotel and Restaurant Supply Company, showing a total sum charged of \$184.95. The indictment alleges that this was in violation of the Emergency Price Control Act of 1942 and maximum price regulation No. 148.

Count 22 charges that on or about the 7th day of June 1945 the defendants did wilfully and unlawfully make or cause to be made an entry false in a material respect upon Invoice No. 4437 of the aforesaid Vernon Hotel and Restaurant Supply Company, showing a total sum charged of \$453.17. The indictment alleges that this was a document required to be kept under the Emergency Price Control Act of 1942 and maximum price regulations 148, 169 and 239.

Count 23 charges that on or about the 29th day of November 1944 the defendants wilfully and unlawfully



did offer, solicit and attempt and agree to sell and did sell to [15] Austin T. Snider certain meat items, to wit, pork bellies, hogs, back fat, as shown on Invoice No. 44976, in violation of maximum price regulation No. 148; that the price for pork bellies was 21-3/4 cents a pound; hogs, 21-1/2 cents a pound; back fat, 13 cents a pound.

Count 24 alleges that on or about December 7, 1944, the defendants wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Austin T. Snider certain meat items, to wit, packer hogs, as shown on Invoice No. 45217 in violation of maximum price regulation No. 148, which regulation provided for the price of packer hogs at 21-1/2 cents a pound.

Count 25 alleges that on or about the 26 day of February 1945 the defendants wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Austin T. Snider certain meat items, to wit, packer hogs, as shown on Invoice No. 47682 in violation and in excess of the maximum price as fixed by maximum price regulation No. 148 at 21-1/2 cents a pound.

Count 26 has been withdrawn.

Count 27 has been withdrawn.

Count 28 has been withdrawn.

Count 29 has been withdrawn.

Count 30 charges that on or about the 14th day of February 1945 the defendants wilfully and unlawfully did offer, [16] solicit, attempt and agree to sell and did sell to George's Market (George A. Veuhoff) certain meat items, to wit, Grade C. beef as shown on Invoice No. 47374 above the maximum price regulation No. 169 which fixes the price for Grade C beef at 18-1/4 cents a pound.



Count 31 charges that on or about the 13th day of February 1945 the defendants wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to George's Market (George F. Veuhoff) certain meat items, to wit, Grade CC beef, Grade C beef, as shown on Invoice No. 47348 in violation of maximum price regulation No. 169, which fixes the maximum price for Grade CC beef at 15-1/2 cents a pound and for Grade C beef 18-1/4 cents a pound.

Count 32 charges that on or about the 26th day of January 1945 the defendants wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to George's Market (George F. Veuhoff) certain meat items, to wit, hams, bacon, as shown on Invoice No. 46740 for a price per pound in excess of the maximum price regulation No. 148, which fixes the maximum price for hams at 34 cents a pound and for bacon at 27 cents a pound.

Count 33 charges that on or about the 5th day of February 1945 the defendants wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to George's Market (George F. Veuhoff) certain meat items, to wit, hams, as shown [17] on Invoice No. 47034 in excess of the maximum for said items as fixed by maximum price regulation No. 148. The maximum price per pound under the regulation for hams was 34 cents a pound.

Count 34 has been withdrawn.

Count 35 has been withdrawn.

Count 36 has been withdrawn.

Count 37 has been withdrawn.

Count 38 has been withdrawn.

Count 39 has been withdrawn.

Count 40 has been withdrawn.

Have I omitted to state any count that was not withdrawn?

Mr. McLaughlin: No, your Honor.

Mr. Strong: No, your Honor.

The Court: Now, that is the indictment and, as I have already stated, to that indictment each of the defendants has pleaded not guilty which puts the government upon its proof to establish the material allegations of the indictment beyond a reasonable doubt.

By the finding of an indictment or filing an information no presumption whatsoever arises to indicate that a defendant is guilty, or that he has had any connection with, or responsibility for, the act charged against him. A defendant is presumed to be innocent at all stages of the proceeding until the evidence introduced on behalf of the government [18] shows him to be guilty beyond a reasonable doubt. The burden is not upon a defendant to establish his innocence and this rule applies to every material element of the offense charged. Mere suspicion or mere probability will not authorize a conviction.

You are instructed that the law does not require any defendant to prove his innocence, which in many cases might be impossible, but, on the contrary, the law requires the government to establish any such guilt by legal evidence and beyond a reasonable doubt. The presumption of innocence goes with the defendant throughout the whole trial, and such presumption outweighs and overbalances all suspicions and suppositions, and can only be destroyed by proof of guilt beyond a reasonable doubt.

You are instructed that the presumption of innocence with which the defendant is at all times clothed is not a mere form to be disregarded by you at pleasure, but that it is an essential, substantial part of the law and binding on you in this case, and it is your duty in this case to give the defendant the full benefit of this presumption, and to acquit these defendants, and each of them, unless the evidence, in the case convinces you of their guilt as charged beyond all reasonable doubt.

If you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, [19] you should do so, and in that case find the defendant not guilty. You cannot find the defendant guilty unless from all the evidence you believe him guilty beyond a reasonable doubt.

A reasonable doubt is a doubt based on reason and which is reasonable in view of all the evidence, and if, after an impartial comparison and consideration of all the evidence or from a want of sufficient evidence on behalf of the government to convince you of the truth of the charge, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

By such reasonable doubt, you are not to understand that all doubt is to be excluded; it is impossible in the determination of these questions to be absolutely certain. You are required to decide the question submitted to you

upon the strong probabilities of the case and, to justify a conviction, the probabilities must be so strong as not to exclude all doubt or possibility of error, such as to exclude reasonable doubt.

When weighing all the evidence, you have an abiding conviction and belief that the defendant is guilty, it is [20] your duty to convict, and no sympathy justifies you in seeking for doubts by any strained or unreasonable construction or interpretation of evidence or facts.

Reasonable doubt is not any mere possible doubt; because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

The law under which Count 1 of the indictment in this case is drawn provides that if two or more persons conspire to commit any offense against the United States, and one or more of them does any act to effect the object of the conspiracy, each of the parties to such conspiracy is guilty. In determining whether the defendants conspired to commit any offense as charged in Count 1, you cannot find that such conspiracy existed by reason of statements of the defendants alone. There must be other evidence showing that they had so conspired.

In order to warrant you in finding a verdict of guilty against the defendants, or any of them, it is necessary that you be satisfied beyond a reasonable doubt that a conspiracy as charged in Count 1 of the indictment was entered into be- [21] tween two or more of the defend-

ants to violate the law of the United States in the manner described in the indictment. It is necessary further, that in addition to the showing of the unlawful conspiracy or agreement, the government prove to your satisfaction, beyond a reasonable doubt, that one or more of the overt acts described in the indictment was done by one or more of the defendants or at their direction or with their aid.

To constitute a conspiracy it is not necessary that two or more persons should meet together and enter into an express or formal agreement for the unlawful venture or scheme, or that they should directly, by words or in writing, state between themselves or otherwise what the unlawful plan or scheme is to be, or the details thereof, or the means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, when an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy. The success or failure of the conspiracy is immaterial, but before the defendants may be found guilty of the charge it must appear [22] beyond a reasonable doubt that a conspiracy was formed as alleged in the indictment, and that the defendants were active parties thereto.

Every essential fact necessary to constitute the conspiracy charged must be proved by sufficient evidence, including the necessary intent or motive, and the com-

mission of the overt act; and the evidence must sufficiently establish the existence of a confederation or agreement between two or more persons, and that at least two of the persons charged committed the offense. Proof of overt acts may or may not be sufficient to prove the existence of the conspiracy, but such acts may properly be considered with other evidence in determining the existence of the conspiracy. Not only must the conspiracy be established, but it is equally essential to show accused's connection therewith if a conviction is to be sustained, and it is necessary, as it is in criminal prosecutions generally, to establish the guilt of the accused beyond a reasonable doubt.

Under the charge made the conspiracy constitutes the offense and it must be made to appear from the evidence, beyond a reasonable doubt, before any defendant can be convicted, that such defendant was a party to the conspiracy and unlawful agreement charged, and that he continued to be such up to the time that overt acts were committed, if the evidence shows that there were any such. The mere fact that [23] either or any of the defendants named may have engaged in the performance of any of the acts charged in the indictment as overt acts, would not authorize a conviction by reason of that fact alone, but it is necessary to show that such defendant or defendants were parties to the conspiracy and unlawful agreement before their guilt of the offense charged is made out.

Each party must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, one performing one act, and a second another act, all with a view to the attainment of



the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Cooperation in some form must be shown. There must be intentional participation in the transaction with a view and purpose to further the common design. And if a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, with a purpose to forward the enterprise or scheme, assists in its prosecution, he becomes a conspirator. And so a new party, coming into a conspiracy after its inception, with knowledge of its purpose and object, and with intent to promote the same, becomes a party to all of the acts done before his introduction into the unlawful combination, as well as to the acts done afterwards. Joint assent and joint participation in the conspiracy may be found, like [24] any other fact, as an inference from facts proved.

Where the existence of a criminal conspiracy has been shown, every act or declaration of each member of such conspiracy, done or made thereafter pursuant to the concerted plan and in furtherance of the common object, is considered the act and declaration of all the conspirators and is evidence against each of them. On the other hand, after a conspiracy has come to an end, either by the accomplishment of the common design, or by the parties abandoning the same, evidence of acts or declarations thereafter made by any of the conspirators can be considered only as against the person doing such acts or making such statements. The declaration or act of a conspirator not in execution of the common design is not evidence against any of the parties other than the one making such declaration.



It is not necessary that it be shown that any person concerned in the alleged conspiracy profited by the things which he did, but if any of the defendants, with knowledge that the law was designed to be violated in the particular manner charged in the indictment, aided in any way by affirmative action in the accomplishment of the unlawful act, they would be guilty.

The defendants are here prosecuted for alleged violations of the Emergency Price Control Act of 1942, in that they violated certain regulations issued pursuant to this Act. This [25] law was adopted by the Congress of the United States pursuant to authority given to the Congress of the United States by the Constitution. You are not concerned with the wisdom or unwisdom of this Act or the regulations involved. They are the law of the land and you must be governed by them in the determination of this case.

It is not an offense under the regulations or the law involved in this case to refuse to sell meat to a purchaser or prospective purchaser regardless of the reason for such refusal.

The regulations of the Office of Price Administration which were involved in this case require that the seller maintain an accurate record of each sale, transfer, delivery, purchase, receipt, acquisition, or other such transaction, showing:

(1) The date thereof.

(2) The names and addresses of the parties taking part in the transaction, such as the buyer and seller.

(3) The description, quantity and weight of all wholesale pork cuts sold, transferred, delivered, purchased, received or acquired, specifically showing:

(i) The descriptive name of the wholesale pork cut, including the grade of sliced bacon.

(ii) The weight range or ranges of dressed hogs and/or wholesale pork cuts as named and defined in this regulation. [26]

(iii) The number of pieces in each weight range of any items for which ranges are specified, except spare ribs and Boston butts.

(iv) The total weights of all items in each specified weight range.

(4) The price charged, received or paid therefor, and they do not require the maintenance of any other records, or documents.

The parties to this case have stipulated that the highest legal prices which could be charged for the meat items with which you are concerned in this case, are the prices stated on the various invoices which have been introduced in evidence in this case.

I now instruct you that under the Emergency Price Control Act of 1942 and the maximum price regulations Nos. 148, 169 and 239, the highest prices which could be charged for the various meat items involved in this case are those shown on the invoices which have been introduced in evidence.

The maximum legal prices relative to each count of the indictment are as follows:

Count 2 for pork loins, short cuts, 26 cents a pound; for pork shoulders, New York, 25 cents a pound;

Count 3 for Grade A veal, 23 cents a pound;

Count 4 for pork shoulders, New York, 26-1/4 cents a pound. For pork loins, short cuts, 27-1/2 cents a pounds [27]

Count 5 for pork loins, short cuts, 27-1/2 cents a pound; for pork shoulders, New York, 26-1/4 cents a pound; for pork legs, 27-1/2 cents a pound;

Count 6 for pork loins, short cuts, 26-3/4 cents a pound; for pork shoulders, New York, 25-3/4 cents a pound;

Count 7 for pork loins, short cut, 27 cents a pound; for pork shoulders, New York, 26 cents a pound; for bacon 27 cents a pound; for hams 34-1/4 cents a pound;

Count 8 for Grade A veal, 22-3/4 cents a pound;

Count 9 for pork loins, short cuts, 26-3/4 cents a pound; for pork shoulders, New York, 25-3/4 cents a pound;

Count 10 for Grade C beef, 18-1/4 cents a pound;

Count 11 for Grade B veal, 21 cents a pound;

Count 23 for pork bellies, 21-3/4 cents a pound; hogs 21-1/2 cents a pound; back fat, 13 cents a pound;

Count 24 for packer hogs, 21-1/2 cents a pound;

Count 25 for packer hogs, 21-1/2 cents a pound;

Count 26 for pork shoulders, New York, 26 cents a pound; pork loins, short cuts, 27 cents a pound; Grade A beef, 22 cents a pound; Grade A lamb, 25-3/4 cents a pound;

Count 27 for Grade A regular beef chucks, 21-1/4 cents a pound; Grade AA beef rounds, 24-3/4 cents a pound; Grade A beef, 22 cents a pound, and Grade AA beef, 23 cents a pound;

Count 28 for pork bellies, 21 cents a pound;

Count 29 for Grade C beef, 18-1/4 cents a pound; for Grade [28] B veal, 21 cents a pound;

Count 30 for Grade C beef, 18-1/4 cents a pound;

Count 31 for Grade CC beef, 15-1/2 cents a pound;  
for Grade C beef, 18-1/4 cents a pound;

Count 32 for hams, 34 cents a pound; for bacon, 27 cents a pound;

Count 33 for hams, 34 cents a pound;

Count 34 for pork bellies, 21 cents a pound;

You need not be concerned with the fact that prices vary for the same item. That results from changes in the maximum price regulations.

During the course of this trial objections were made to the introduction of certain documents in evidence and to some of the questions asked the witnesses. In each instance I have ruled on the objection made, and I either admitted the evidence or excluded it. As the judge in this case, it is exclusively my duty and power to make such rulings. Both counsel for the parties and you, the jury, are bound by those rulings. In your deliberations you are not to reconsider or question my rulings. You must accept them, and must treat the evidence which I have admitted into the record as being properly before you in this case.

A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price. [29]

A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

The Emergency Price Control Act of 1942, provides that any person who wilfully violates certain provisions of the Act shall be guilty of an offense.

Among the provisions of the Act to which this provision applies is the following:

“It shall be unlawful, regardless of any contract, agreement . . . or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, . . . or otherwise do or omit to do any act, in violation of any regulation or order . . . of any price schedule effective in accordance with the provisions of” this Act.

The prices which I have read to you as the highest lawful price in effect on certain days for the several meat items, to which I have referred, were fixed in accordance with the Emergency Price Control Act of 1942 from which I have just read and those prices, and each and every one of such prices was accordingly fixed by law.

Defendants are charged with having wilfully violated these regulations. The word “wilfully” as used in the Emergency Price Control Act of 1942 and in the indictment simply means an intentional, conscious doing of the act prohibited; [30] that is, intending the result which actually comes to pass, without ground for believing it is lawful, or conduct marked by careless disregard as to whether or not one has the right so to act. Or to express it another way, it means purposely or obstinately, and is designed to describe the attitude of a person, who, having a free will or choice, either intentionally disregards the law or is plainly indifferent to its requirements.

This is an offense requiring a specific intent, and such intent must be shown to exist beyond a reasonable doubt. The intent on the part of the defendant may be shown by his acts and declarations and by the circumstances surrounding his actions which, when taken together, must

prove beyond a reasonable doubt that the defendant had the specific intent to wilfully sell and deliver meat at a price or prices in excess of the lawful price or prices.

If you are convinced beyond a reasonable doubt that the defendant did in fact sell meat to any one or more of the persons named in the several counts of the indictment, and that he did in fact charge a price or prices for such meat in excess of the prices I have stated to you, and that he at such time or times intended to so sell such meat at higher price or prices than permitted by the Maximum Price Regulations promulgated under the Emergency Price Control Act of 1942, then you will find that he did so with a specific intent. [31]

The Emergency Price Control Act of 1942, as amended, makes it unlawful for any person to sell or deliver any commodity, or to do or omit to do any act in violation of any regulation or price schedule, or to offer, solicit, attempt or agree to do so.

Maximum Price Regulations Nos. 148, 169 and 239 are price regulations issued pursuant to the Emergency Price Control Act of 1942.

Maximum Price Regulation No. 148 deals with dressed hogs and wholesale pork cuts. Maximum Price Regulation No. 169 deals with beef and veal carcasses and wholesale cuts. Maximum Price Regulation No. 239 deals with lamb and mutton carcasses and wholesale cuts.

Revised Maximum Price Regulation No. 169 in part provides:

“Section 1364.406 Evasion. (a) The price limitations set forth in this Revised Maximum Price Regulation No. 169, shall not be evaded, either by direct or indirect methods, in connection with an offer, solicitation, agree-



ment, sale, delivery, purchase or receipt of, or relating to beef or veal, separately or in conjunction with any other commodity or service, or by way of any commission, service, transportation, wrapping, packaging or other charge or discount premium or other privilege, or by tying agreement or other trade understanding, or by changing the selection of, grading, or the style of dress-  
[32] ing, cutting, trimming, cooking or otherwise processing, or the canning, wrapping or packaging of beef or veal or otherwise: \* \* \*

Section 1364.407 Records and reports. \* \* \*

“(a) Every person making a sale and every person in the course of trade or business making a purchase of any beef carcass, beef wholesale cut, veal carcass or veal wholesale cut or other meat item subject to this revised regulation, shall make and preserve for inspection by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, complete and accurate records of each such sale or purchase, showing the date thereof, the name and address of the buyer and seller, the quantity, type of cut or item, grade or grades and the weight of all beef carcasses, beef wholesale cuts, veal carcasses and veal wholesale cuts or other meat items subject to this revised regulation sold or purchased and the price charged or received or paid therefor.”

\* \* \*

“Section 1364.401 Prohibition against selling beef and veal carcasses and whole cuts at prices above the maximum.—(a) Beef carcasses and wholesale cuts. On and after December 16, 1942, regardless of any contract, agreement, or other obligation no person shall sell or



deliver any beef carcass or beef wholesale cut, and no person shall buy or receive [33] any beef carcass or beef wholesale cut, and no person shall buy or receive any beef carcass or beef wholesale cut at a price higher than the maximum price permitted by Section 1364.451; and no person shall agree, offer, solicit or attempt to do any of the foregoing. \* \* \*

There are in effect substantially similar provisions in Revised Maximum Price Regulations 148 as to pork, and 239 as to lamb, except that under Revised Maximum Price Regulation 148 there is no evasion provision such as I have read above, and the record keeping provision is in different terms. The substance of the regulation is that certain records must be kept including such as are involved in this case and that they must be truthful and cannot be wilfully made false.

There were originally 40 counts in this indictment. The government has elected, as it has a right to do, not to *ffer* any evidence in support of Counts 12, to 15, 19, 26, to 29, 34 to 40. These counts are no longer a part of this indictment and are not to be considered by you. Of the remaining 26 counts which are before you, Count 1 has been brought under Title 18, U. S. C. Sec. 88, commonly called the conspiracy statute. The remaining 24 counts have been brought under the Emergency Price Control Act of 1942, as amended, Title 50, U. S. C. App. Sec. 901 et seq. All those counts relate to the alleged illegal overceiling sales of meat and to false record invoice entries as to such sales. The counts charging [34] overceiling sales are 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 23, 24, 25, 30, 31, 32 and 33. The counts charging false entries are 16, 17, 18, 20, 21 and 22.

Concerning each of Counts 16, 17, 18, 20, 21 and 22 of the indictment, if you believe beyond a reasonable doubt that on or about the dates alleged in the indictment as to each of these counts, the defendants or any defendant sold the meat shown in each such count at a price per pound in excess of that shown on the invoice described in each such count and introduced in evidence in this case, and that the defendants or any defendant wilfully and deliberately, and not as a result of innocent mistake entered or caused to be entered upon said invoice a statement showing such sale, an entry that the sale had been made at a price per pound below that at which the sale was actually made, then you will find the defendant or defendants guilty as charged in that count of the indictment, regardless of what you may believe the correct ceiling price of such meat to have been at that time.

On the other hand, if you entertain a reasonable doubt as to whether any one or more of the elements I have just recited to you have been proved, you must give the defendant or defendants the benefit of that doubt and acquit him or them.

Counts 16, 17, 18, 20, 21 and 22 of the indictment allege an offense of making or keeping false invoices. Unless [35] you are satisfied beyond a reasonable doubt that each of such invoices was false in some respect, you must find for the defendants on each of those counts.

Concerning each of Counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 23, 24, 25, 30, 31, 32 and 33, of the indictment, if you believe beyond a reasonable doubt that on or about the dates alleged in the indictment as to each of these counts the defendants or any one of them did on that date sell the items alleged as to each such count in the indictment

and as a part of each such transaction did wilfully require of and receive from the purchaser the payment of any sum of money in excess of the maximum price per pound, then you will convict the defendant or defendants of the offense charged in that count. But if you have any reasonable doubt as to whether any one or more of the elements I have read to you have been proved, you will acquit the defendant or defendants as to that count.

Certain witnesses in this case have given testimony in effect that they have engaged in unlawful transactions with the defendants in that they paid to the defendants overceiling prices for the meat which these witnesses purchased from the defendants. Although they may not be accomplices in the technical sense that they claim to have committed the identical crime with which defendants are charged, I think it appropriate to instruct you that under their testimony they have [36] claimed an unlawful association with the subject matter of the case, that if you believe their testimony you will accept the proposition that they are themselves violators of the Emergency Price Control Act of 1942. You should subject the testimony of those witnesses to close scrutiny and it should be treated with caution. You must examine it with care to determine whether it is trustworthy. However, if such evidence does produce conviction in your minds so that you do believe it to be true you may rely upon it. The testimony of associates in crime is sufficient to support a conviction if believed, provided that it otherwise meets the requirements of these instructions.

Without it being restated or repeated, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered

in connection with and as accompanying all the instructions that are given to you.

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial. In judging of the credibility of witnesses, you shall have in mind the law that a witness is presumed to speak the truth. This presumption, however, may be repelled by contradictory evidence, by the manner in which the witness testifies, by the character of his testimony, or by evidence. [37]

In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable jurors. You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relation which he bears to the parties to this action, the manner in which he might be affected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility.

Testimony of any person participating in a crime, whether participating as a buyer or seller in a transaction forbidden by law, is not entitled to the full credit given to testimony of other witnesses, regardless of whether such accomplice has been called by the government or the defense.

Under the terms of the regulations, a buyer is prohibited from paying a price in excess of the ceiling price and a seller is prohibited from selling in excess of the

ceiling price, so if a buyer paid in excess of the ceiling price, he would be an accomplice.

Testimony of a witness as to what one of the defendants might have said is not admissible as against any other defend- [38] ant not present at the time that such statement was made unless you find from other evidence that a conspiracy exists.

You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind, as against the declarations of a lesser number or a presumption or other evidence, which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

The testimony of one witness, entitled to full credit, is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony even if a number of witnesses have testified to the contrary, if, from the whole case, considering the credibility of the witnesses and after weighing the various factors of evidence, the jury should believe that there is a balance of probability pointing to the accuracy and honesty of the one witness.

A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the

whole [39] testimony of a witness who wilfully has testified falsely as to a material point, unless, from all the evidence, you shall believe that the probability of truth favor his testimony in other particulars.

The defendant in a criminal action is not required to take the stand and testify. No presumption of guilt should be indulged in by you for the reason that the defendants have not testified. The government under our law must establish the guilt of each defendant beyond a reasonable doubt. The defendants are not required to establish their innocence.

It is proper to consider all of the matters that have been suggested to you in that connection, including the interest that the defendant may have in the case, his hopes and his fears, and what he has to gain or lose as a result of your verdict. You are not limited in your consideration of the evidence to the bald expressions of the witnesses. You are authorized to draw such inferences from the facts and circumstances which you find have been proved as seem justified in the light of your experience as reasonable men and women. Admissions of a defendant are to be received with caution.

Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes the fact. Indirect evidence is that [40] which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact in issue, but which affords an inference or presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences.



A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but unless so controverted the jury is bound to find according to the presumption.

An inference is a deduction which the reason of the jury draws from the facts proved. It must be founded on a fact or facts proved and be such a deduction from those facts "as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature."

The word "propensity" as used in this instruction means any "natural or habitual inclination or tendency."

The law in regard to circumstantial evidence is this: In order to justify a jury in finding a verdict of guilty based entirely on circumstantial evidence, the circumstances must not only be consistent with the guilt of the defendant, but they must be inconsistent with any other reasonable hypothesis that can be predicated on the evidence; or, stated in [41] another form, it is not sufficient that the circumstances proved coincide with, or account for, and therefore render probable, the hypothesis of guilt asserted by the prosecution, but they must exclude to a moral certainty and beyond a reasonable doubt, every other hypothesis but the single one of guilt, or the jury must find the defendant not guilty. In order to warrant a conviction of crime on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt. All the facts necessary to the conclusion



must be consistent with each other and with the main facts sought to be proved; and the circumstances, taken together, must be of a conclusive nature, leading on the whole to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the defendant (and no other person) committed the offense charged; and unless the evidence does so it will be your duty to acquit the defendant. So, ladies and gentlemen, you will observe that there is nothing very peculiar or hard to understand about this doctrine of circumstantial evidence. The jury, in the first place, must determine from the testimony of the witnesses what are the facts and circumstances in the case—the facts and circumstances which you believe have been established by the testimony; and then you simply apply your common sense and judgment to a consideration of what deductions or inferences or con- [42] clusions ought to be drawn from those facts. And if, on consideration of all the facts which you may believe to have been established by the evidence, you are satisfied in your own minds, beyond a reasonable doubt, that the defendant is guilty, then it is your duty to so declare; but, if you are not so satisfied, it will be your duty to render a verdict of not guilty.

You shall not consider as evidence any statement or argument of counsel made during the trial, unless such statement or argument was made as an admission or stipulation conceding the existence of a fact or facts, or you find justified by the evidence. You must not consider for any purpose any evidence offered and rejected, or which has been stricken out by the court; such evidence is to be treated as though you never had heard it. You are to decide this case solely upon the evidence that

has been admitted by the court, and the inferences that you may reasonable draw therefrom, and such presumptions as the law may deduce therefrom, as directed in my instructions, and in accordance with the law as I state it to you.

In judging of the evidence, you are to give it a reasonable and fair construction, and you are not authorized, because of any feeling or sympathy or other bias, to apply a strained construction, one that is unreasonable, in order to justify a certain verdict when, were it not for such feeling [43] or bias, you would reach a contrary conclusion. And, whenever, after a careful consideration of all of the evidence, your minds are in that state where a conclusion of innocence is indicated equally with a conclusion of guilt, or there is a reasonable doubt as to whether the evidence is so balanced, the conclusion of innocence must be adopted.

If in these instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions and as a whole, and to regard each in the light of all the others.

There are two types of verdict. One is a verdict of guilty and the other is a verdict of not guilty. Whatever verdict you render must be unanimous. It is not necessary that you rendered the same verdict as to each defendant, nor is it necessary before returning a verdict as to a particular defendant or defendants that you shall have reached a unanimous verdict as to some other defendant. If you cannot agree with respect to any de-

fendant or the defendants, you should so advise the court after becoming satisfied that such an agreement is impossible among you.

There is nothing peculiarly different in the way a jury is to consider the proof in this criminal case from that by [44] which men give their attention to any question depending upon evidence presented to them. You are expected to use your good sense, consider the evidence for the purposes only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains the government is entitled to a verdict. In determining what your verdict shall be you are to consider only the evidence before you. To the jury exclusively belongs the duty of determining the facts. The law you must accept from the court as correctly declared in these instructions.

You are instructed that if I have done or said anything which has suggested to you that I am inclined to favor the claims or position of either party, you will not suffer yourself to be influenced by any such suggestion. While the law permits the judge to express his opinion on the evidence, I have not expressed, nor intended to express, nor have I intimated nor intended to intimate, any opinion as to what witnesses are, or are not worthy of credence; what facts are, or are not, established; or what inferences should be drawn from the evidence adduced. If any expression of mine has seemed to indicate an opin-

ion relating to any of these matters, [45]. I instruct you to disregard it.

You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against any party to the action. The attitude of jurors at the outset of their deliberations is a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if and when shown that it is fallacious. Remember that you are not partisans or advocates in this matter, but are judges. The final test of the quality of your service will lie in the verdict which you return to this court room, not in the opinions any of you may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. To that end, the court would remind you that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth. It is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement if you can do so without violence to your individual judgment. To each of you I would say that you must decide the case for yourself but should [46] do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous.

However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors. Upon retiring to the jury room you will select one of your number to act as foreman who will preside over your deliberations and who will sign the verdict to which you agree. As soon as you shall have agreed upon a unanimous verdict, you shall have it signed and dated by your foreman, and then shall return with it to this room.

A form of verdict will be given to you. It reads:

“In the District Court of the United States, in and for the Southern District of California, Central Division.

“United States of America, plaintiff, vs. Jack L. Kissel, defendant.”

There is a blank line in front of each numbered count of the indictment and in that blank space you will write the words “Guilty” or “Not Guilty” as you shall find.

The second page reads:

“We the jury in the above-entitled case find the defendant [47] ant Frederick Alexander Shubin,” and then a blank line in front of each one of the counts in which you will write “Guilty” or “Not Guilty.”

The third page reads:

“We the jury in the above-entitled case find the defendant William A. Shubin charged as William Shubin,” and then a blank line in which you will write either “Guilty” or “Not Guilty.”

Any exceptions, gentlemen, to the instructions?

Mr. Neukom: None, your Honor.

The Court: The defendants?

Mr. McLaughlin: No exceptions.

The Court: Swear the bailiff.

(Thereupon, at 3:40 o'clock p. m., the jury retired to begin their deliberations, and returned to the court room with their verdict at 8:32 o'clock p. m., of the same evening.)

The Court: Stipulate that the jury is present?

Mr. McLaughlin: So stipulated.

Mr. Neukom: So stipulated.

The Court: Stipulate that the defendants are in the court room?

Mr. McLaughlin: So stipulated.

Mr. Neukom: So stipulated.

The Court: Ladies and gentlemen, have you arrived at [48] a verdict in this case?

The Foreman: We have, your Honor.

The Court: Hand it to the bailiff. The clerk will read the verdict.

The Clerk: "In the District Court of the United States, in and for the Southern District of California, Central Division.

"United States of America, plaintiff, vs. Jack L. Kissel, defendant; No. 18367 Criminal.

"We, the jury in the above entitled case, find the defendant Jack L. Kissel:



"Guilty as charged in the first count of the indictment;

"Guilty as charged in the second count of the indictment;

"Guilty as charged in the third count of the indictment;

"Guilty as charged in the fourth count of the indictment;

"Guilty as charged in the fifth count of the indictment;

"Guilty as charged in the sixth count of the indictment;

"Guilty as charged in the seventh count of the indictment;

"Guilty as charged in the eighth count of the indictment;

"Guilty as charged in the ninth count of the indictment;

"Guilty as charged in the tenth count of the indictment;

"Guilty as charged in the 11th count of the indictment;

"Guilty as charged in the 16th count of the indictment;

"Guilty as charged in the 17th count of the indictment;

"Guilty as charged in the eighteenth count of the indictment; [49]

"Guilty as charged in the 20th count of the indictment;

"Guilty as charged in the 21st count of the indictment;

"Guilty as charged in the 22nd count of the indictment;

"Guilty as charged in the 23rd count of the indictment;

"Guilty as charged in the 24th count of the indictment;

"Guilty as charged in the 25th count of the indictment;

"Guilty as charged in the 30th count of the indictment;

"Guilty as charged in the 31st count of the indictment;

"Guilty as charged in the 32nd count of the indictment;

"Guilty as charged in the 33rd count of the indictment.

"Dated: Los Angeles, California, June 21st, 1946.

"C. P. Conrad, Foreman of the Jury."



“In the District Court of the United States, in and for the Southern District of California, Central Division.

“United States of America, plaintiff, vs. Frederick Alexander Shubin, defendant; No. 18367 Criminal.

“We the jury in the above-entitled case find the defendant Frederick Alexander Shubin:

“Guilty as charged in the first count of the indictment;

“Not guilty as charged in the second count of the indictment;

“Not guilty as charged in the third count of the indictment;

“Not guilty as charged in the fourth count of the indictment; [50]

“Not guilty as charged in the fifth count of the indictment;

“Not guilty as charged in the sixth count of the indictment;

“Not guilty as charged in the seventh count of the indictment;

“Not guilty as charged in the eighth count of the indictment;

“Not guilty as charged in the ninth count of the indictment;

“Not guilty as charged in the tenth count of the indictment;

“Not guilty as charged in the 11th count of the indictment;

“Guilty as charged in the 16th count of the indictment;

“Guilty as charged in the 17th count of the indictment;

“Guilty as charged in the 18th count of the indictment;

“Guilty as charged in the 20th count of the indictment;

“Guilty as charged in the 21st count of the indictment;

“Guilty as charged in the 22nd count of the indictment;

“Not guilty as charged in the 23rd count of the indictment;

“Not guilty as charged in the 24th count of the indictment; [51]

“Not guilty as charged in the 25th count of the indictment;

“Not guilty as charged in the 30th count of the indictment;

“Not guilty as charged in the 31st count of the indictment;

“Not guilty as charged in the 32nd count of the indictment;

“Not guilty as charged in the 33rd count of the indictment;

“Dated: Los Angeles, California, June 21, 1946.

“C. P. Conrad, Foreman of the Jury.”

“In the District Court of the United States, in and for the Southern District of California, Central Division,

“United States of America, plaintiff, vs. William A. Shubin, charged as William Shubin, defendant; No. 18367 Criminal.

“We, the jury in the above-entitled case, find the defendant William A. Shubin, charged as William Shubin:

“Guilty as charged in the first count of the indictment;

“Guilty as charged in the second count of the indictment;

“Guilty as charged in the third count of the indictment;

"Guilty as charged in the fourth count of the indictment;

"Guilty as charged in the fifth count of the indictment;

"Guilty as charged in the sixth count of the indictment; [52]

"Guilty as charged in the 7th count of the indictment;

"Guilty as charged in the eighth count of the indictment;

"Guilty as charged in the ninth count of the indictment;

"Guilty as charged in the 10th count of the indictment;

"Guilty as charged in the 11th count of the indictment;

"Guilty as charged in the 16th count of the indictment;

"Guilty as charged in the 17th count of the indictment;

"Guilty as charged in the 18th count of the indictment;

"Guilty as charged in the 20th count of the indictment;

"Guilty as charged in the 21st count of the indictment;

"Guilty as charged in the 22nd count of the indictment;

"Guilty as charged in the 23rd count of the indictment;

"Guilty as charged in the 24th count of the indictment;

"Guilty as charged in the 25th count of the indictment;

"Guilty as charged in the 30th count of the indictment;

"Guilty as charged in the 31st count of the indictment;

"Guilty as charged in the 32nd count of the indictment;

"Guilty as charged in the 33rd count of the indictment.

"Dated: Los Angeles, California, June 21, 1946.

"C. P. Conrad, Foreman of the Jury."

So say you all, ladies and gentlemen?

The Jury: Yes.

The Court: Does either the government or the defendant wish the jury polled?

Mr. Neukom: No, your Honor. [53]

Mr. McLaughlin: No, your Honor.

The Court: Ladies and gentlemen of the jury, you will be excused from further service until notified by the clerk to report.

Thank you.

[Endorsed]: Filed Sep. 13, 1946. [54]

[Endorsed]: No. 11382. In the United States Circuit Court of Appeals for the Ninth Circuit. William Shubin, Frederick Alexander Shubin and Jack L. Kissel, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed September 19, 1946.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11382

WILLIAM SHUBIN, FREDERICK ALEXANDER  
SHUBIN, and JACK L. KISSEL,

Defendants and Appellants,

vs.

UNITED STATES OF AMERICA,

Plaintiff and Appellee.

STATEMENT OF POINTS UPON WHICH  
APPELLANTS INTEND TO RELY ON APPEAL

To Paul P. O'Brien, Clerk of the Above Entitled Court:

Appellants and defendants above named have heretofore filed with the Clerk of the District Court a statement of points on appeal, and said statement of points on appeal has been embodied in the Clerk's Transcript. To avoid duplication, Appellants hereby refer to and adopt such statement of points as the statement of points upon which they intend to rely upon this appeal.

Dated: This 19th day of September, 1946.

McLAUGHLIN, MCGINLEY & HANSON

By James A. McLaughlin

Attorneys for Defendants and Appellants William Shubin,  
Frederick Alexander Shubin, and Jack L. Kissel

[Affidavit of Service by Mail.]

[Endorsed]: Filed Sep. 20, 1946. Paul P. O'Brien,  
Clerk.